UNITED STATES BANKRUPTCY COURT

SOUTHERN DISTRICT OF NEW YORK

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In the Matter of:

08-13555(JMP)

LEHMAN BROTHERS HOLDINGS INC., (Jointly Administered)

ET AL.,

Debtors.

\- x

In the Matter of:

08-01420(JMP)(SIPA)

LEHMAN BROTHERS INC.,

Debtor.

\- x

MICHIGAN STATE HOUSING DEVELOPMENT

AUTHORITY,

Plaintiff,

v. Adv. Case No. 09-01728

LEHMAN BROTHERS SPECIAL FINANCING

INC., ET AL.,

Defendants.

\- x

LEHMAN BROTHERS HOLDINGS INC.,
ET AL.,
Plaintiffs,
v. Adv. Case No. 13-01340
INTEL CORP.,
Defendant.
- x
FIRSTBANK PUERTO RICO,
Plaintiff,
v. Adv. Case No. 10-04103
BARCLAYS CAPITAL, INC.,
Defendant.
- x
EL VEASTA LAMPLEY,
Plaintiff,
v. Adv. Case No. 13-01354
LEHMAN BROTHERS HOLDINGS INC.,
Defendant.
- x
U.S. Bankruptcy Court
One Bowling Green
New York, New York

September 18, 2013
10:02 AM

B E F O R E :

HON JAMES M. PECK

U.S. BANKRUPTCY JUDGE

Hearing re: Motion of Retirement Housing Foundation and Its Affiliates for a Determination that the Automatic Stay Does Not Bar Commencement of Certain Litigation Against the Debtors related to Post-Petition Claims and/or Granting Relief from the Automatic Stay to Permit Commencement of Such Litigation; and Separately, to Grant RHF Relief from the Automatic Stay to Litigate the Tort Claim in the California State Court [ECF No. 39291]

Hearing re: Motion of RBC Dominion Securities Inc. to Compel Lehman Brothers Holdings, Inc. to Reissue Checks for Allowed Claim [ECF No. 39062]

Hearing re: Trustee’s Motion to Establish Supplemental Procedures for Remaining Customer Distributions Pursuant to SIPA Section 78fff-(2)(b) [LBI ECF No. 7144]

Hearing re: Trustee’s Motion to Establish Claims Hearing Procedures and Alternative Dispute Resolution Procedures for General Creditor Claims Pursuant to Section 105 of the

Bankruptcy Code, Bankruptcy Rule 9014, and General Order M-452 [LBI ECF No. 7146]

Hearing re: Trustee’s Motion for an Order Pursuant to Section 503(a) of the Bankruptcy Code and Bankruptcy Rule 3003(c)(3) Establishing the Deadline for Filing Requests for Payment of Certain Administrative Expenses and Procedures Relating Thereto and Approving the Form and Manner of Notice Thereto [LBI ECF No. 7147]

Hearing re: Motions for Partial Summary Judgment

Hearing re: Pre-Trial Conference and Defendant’s Motion to Dismiss Plaintiffs’ Bankruptcy Claims and for a Determination that Plaintiffs’ Contract Claim is Non-Core

Hearing re: Motion for Civil Contempt Sanctions

Hearing re: Pre-Trial Conference

Hearing re: Motion of Fidelity National Insurance Company to Compel Compliance with Requirements of Title Insurance Policies [ECF No. 11513]

Hearing re: Motion of Monti Family Holding Company, Ltd for

Leave to Conduct Rule 2004 Discovery of Debtor Lehman Brothers Holdings Inc. and Other Entities [ECF No. 16803]

Hearing re: Motion of Giants Stadium LLC for Leave to Conduct Discovery of LBI Pursuant to Federal rule of Bankruptcy Procedure 2004 [ECF No. 36874]

Hearing re: Motion of Baupost Group, LLC to quash Debtors' Subpoena Issued Under Federal Rule of Bankruptcy Procedure 2004 [ECF No. 38941]

Hearing re: Motion of FirstBank Puerto Rico for (1) Reconsideration, Pursuant to Section 502(j) of the Bankruptcy Code and Bankruptcy Rule 094,k of the SIPA Trustee's Denial of FirstBank's Customer Claim, and (2) Limited Intervention, Pursuant to Bankruptcy Rule 7024 and Local Bankruptcy Rule 9014-1, in the Contested Matter Concerning the Trustee's Determination of Certain Claims of Lehman Brothers Holdings Inc. and Certain of Its Affiliates [LBI ECF No. 5197]

Transcribed by: Dawn South and Sheila Orms

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P R O C E E D I N G S

THE COURT: Good morning, be seated, please.

UNIDENTIFIED SPEAKER: Good morning.

UNIDENTIFIED SPEAKER: Good morning, Your Honor.

MR. HORWITZ: Good morning, Your Honor, Maurice Horwitz, Weil Gotshal & Manges on behalf of Lehman Brothers Holdings, Inc. and certain of its affiliates.

We have two contested matters on this morning's agenda.

The first is the motion of Retirement Housing Foundation and its affiliates for determination that the automatic stay does not bar commencement of certain litigation against the debtors.

This -- counsel for Retirement Housing Foundation is in the courtroom and I'll turn the podium over to them to make their initial remarks.

THE COURT: Okay. Before anybody speaks I think we should note that this hearing marks the fifth anniversary of Lehman week, and that it also marks the first Lehman hearing in the refurbished courtroom where it all began. That means that those of you with a sense of history will never be able to see that old courtroom. You can't go home again.

Let's proceed.

MR. KLESTADT: Good morning, Your Honor, Tracy Klestadt of Klestadt & Winters, along with my partner John Jureller, and associate Lauren Kiss (ph) for Retirement Housing. If I may introduce to Your Honor Timothy Reuben of Reuben Raucher & Blum, our co-counsel who'll be making our presentation.

THE COURT: Okay. Fine.

MR. RUEBEN: Good morning, Your Honor. Thank you for allowing me as pro hac vice.

Your Honor, there are essentially two issues before you in our motion. The first issue has to do with the right to file a debt relief action in the state court.

It is our position that the law and Your Honor's jurisprudence is clear, that the exception to the automatic stay, which allows termination and acceleration of the swap should allow similarly here where the sole issue is termination in the debt relief action that we're talking about, the right to proceed and seek debt relief in the state court.

Now, we believe there's no case precisely on point on this particular issue, Your Honor. The closest is the Enron case, which we have cited.

We do believe that the jurisprudence of the Enron case gives direct indication that such an approach would be appropriate.

THE COURT: What do you mean by such an approach?

MR. RUEBEN: The approach of filing a debt relief action to determine termination.

In the Enron cases I am sure Your Honor is aware the plaintiff, Marta (ph), did not come to court and ask permission, and then proceeded to seek a debt relief action outside the precise and narrow grounds that are allowed by the statute.

Essentially, as is reflected in the language of the opinion, Marta's debt relief action was based on uncertainty and insecurity of Marta’s position, not on bankruptcy. In other words --

THE COURT: Let's break in for a second now, because we don't have don't look to Enron, we can deal with deal the Lehman case as a case that stands for the proposition that there is an appropriate single forum to resolve all issues that relate to Lehman's counterparty obligations in derivative transactions. And for the last five years the single court where all such matters have been consolidated is the court you’re now standing in.

Why shouldn't this be the one and only place for all such matters to be resolved? And what's so special about your client? You try to distinguish your client, but it sure does seem a lot like Metavante.

MR. RUEBEN: Well, first of all, as we indicate to

Your Honor, we don't believe Metavante does apply because our --

THE COURT: Now, we're not talking about the specific holding, we're talking about an individual counterparty attempting to distinguish itself from the class of every other counterparty on the planet that dealt with Lehman affiliates, and in effect trying to get the home court advantage by taking this to Los Angeles instead of having you come on a plane as you did I guess yesterday to come here. I've taken that flight, it's not that hard.

MR. RUEBEN: Respectfully, Your Honor, it's not just the lawyer that takes the flight.

THE COURT: It's not that hard for your client either.

MR. RUEBEN: Well --

THE COURT: It's not that hard for witnesses who can be deposed. It's not that hard, this isn't a forum non-conveyance case.

MR. RUEBEN: Correct.

THE COURT: This is a case of proper administration five years in of the largest bankruptcy in history where transactions of this sort routinely are addressed, and I have absolutely no knowledge of the judges in California, I assume they're quite competent and experienced, but they don't deal with things of this sort on

a routine basic, and even if they do there is the potential for inconsistent outcomes, which I suspect is what is seek.

MR. RUEBEN: I'm sorry, Your Honor, it is not what we seek. We are not looking inconsistent outcomes, in fact the jurisprudence of Court and prior cases that this Court has indicated its position are certainly part of the law.

But the actual determination of the termination issue, which I'm not aware that this Court has done, the question of fact that has to be determined under New York state law, the California court is more than adequate.

In fact not to suggest that this Court isn't, of course this Court is perfectly fantastic for that purpose, but the California court deals with New York State court theory -- New York State law issues all the time.

The termination issue, which is the narrow issue of the debt relief claim, is a New York State determination.

The bankruptcy issue, which is now before Your Honor, is whether or not we are correct, and we believe we are, that the precise language of the statute, as narrowly construed by Your Honor and prior case law, allows the proceeding of a debt relief claim to determine that termination question, which is now challenged.

There is no case that I'm aware of where termination has been essentially stymied through the arguments that have been made by counsel here -- by opposing

counsel. We had the right under the expectation to proceed to terminate, we started that process in November, as is reflected in the evidence, and there's no law -- excuse me there's no law that suggests that we cannot proceed with a direct debt relief claim. In fact the argument is to the contrary.

It is true that we also have the right, I think Enron suggests as much, to seek that debt relief in this Court. But there's no intent to find a, as I think Your Honor is suggesting, a friendlier forum.

THE COURT: Well, there is a suggestion in the papers that this is, with all respect, all example of blatant forum shopping, and whether or not it is or it isn't will not affect the outcome, the outcome will be affected by strict application of application Sonnax factors, which we'll get to at some point.

If you're talking about the interpretation of the November 2008 letter that was faxed to Lehman, I took a look at that letter and there is on the first page underlined language indicating that it's not a termination. It's not a termination by its own terms.

MR. RUEBEN: You are correct, Your Honor, absolutely true. It was a notice of default, not a termination. In fact RHF -- Retirement Housing Foundation, my client, did not have the right at that point to terminate

the swaps or if it did it faced default on a $120 million obligation. It was required, as is reflected in the papers, to go through a process of going around to the banks. It was a difficult time for the banks as Your Honor knows, and get express permission. That process, which we proceeded with, took months of effort.

There is no evidence that the termination was for any purpose other than for the bankruptcy of Lehman.

My client is not expert in swaps. My client is a foundation that runs senior centers. They proceeded as well as they could. The suggestion to the contrary is without evidence.

The sole reason being bankruptcy, I would suggest to Your Honor, it falls precisely within the exception that we're talking about, determination. And the question really for Your Honor, which I think Enron gives guidance to, but I hear Your Honor that this is a unique situation before Your Honor.

When we have terminated, and they now say that we have not terminated, and they say that in the situation that we're in now five years into the bankruptcy proceeding what is my client to do?

They contend termination, we feel very strongly about the evidence, but it has to be a factual determination.

THE COURT: Well, this isn't getting to the merits, this is a procedural motion.

But do you look to the November 2008 letter that I've just referenced as evidence of termination or do you look to that letter as evidence of simply giving notice of a default? And if it's simply notice of a default what is the evidence of termination?

MR. RUEBEN: The notice of default only, Your Honor, and the evidence that the process that we had to undertake for termination began. It did take months. The actual termination, as I think is uncontested, was a termination letter in June. So as --

THE COURT: In June of what year?

MR. RUEBEN: 2009, Your Honor.

So essentially what we needed to do and we proceeded to do was go through the process of contacting the banks, arguing with the banks, telling them that that's what we intended to do, and persuading them and their various committees, and there was a consortium of banks, to allow us to terminate.

After they allowed us to terminate we then proceeded with a termination letter and a calculation. We hired a forensic in order to do the calculation, because we didn't of course have the expertise to do that. That forensic is also in Los Angeles I might add. And therefore

we terminated.

Since that time the matter has been under Your Honor's wing and nothing has really happened until recently when during the mediation process, which we can't talk about what happened, but suffice it to say we learned a different approach that Lehman was taking with respect to us.

Now, since that time in these public proceedings Lehman has suggested that RHF, Retirement Housing Foundation, owes them $31 million in interest because of the years that have gone by. Well, that's untenable. From our client's point of view that simply in addition puts them into bankruptcy, but on top of all that we can't allow that process to proceed, we have to resolve the issue of termination and which is why we're asking for the right to do so now.

With respect to our understanding of the procedural right we wanted to obviously seek Your Honor's approval that we have the right to proceed with the debt relief action.

THE COURT: But let's take a look at your motion then. Does the automatic stay apply?

MR. RUEBEN: The answer to the question is for the debt relief action only we contend not, Your Honor.

THE COURT: What do you mean when you keep saying debt relief action? What is the action you're referring to?

MR. RUEBEN: The debt relief action is solely on the issue of termination. The only question is --

THE COURT: Well, let's just define our terms. What do you mean by the term "debt relief action?" It's a term that I generally don't use in this court. I don't know what you mean by it.

MR. RUEBEN: I'm sorry, Your Honor.

We would file a complaint that would seek an order and ruling on the factual question of whether or not under the swap and the swap language Retirement Housing Foundation terminated the swap through its efforts as of June of 2009.

THE COURT: I mean you must know, because you prepared for this hearing, that there are a variety of adversary proceedings pending in this court that touch on, if not the center of that question, the fringes of that question. There are all manner of issues that have arisen within the last five years on the question of the termination of swap agreements. It's a rather routine matter here.

MR. RUEBEN: But with respect to the matter that we are representing to Your Honor it's a unique factual question as to what our client had to do, and I've already described the process.

THE COURT: How can the question be unique if the issue is driven by an interpretation of a standard form ISDA

agreement?

MR. RUEBEN: Because the facts -- it's a factual question. You know, there are witnesses and the processes that we went through that we would put forward as an evidentiary proceeding.

THE COURT: Well, you may try to distinguish your situation from other situations, but your situation necessarily arises out of some standard documentation; isn't that true?

MR. RUEBEN: Well, there's no question that it's a standard ISDA form, Your Honor, but the termination process is purely factual and will require its own set of evidence, testimony, et cetera, that is why we submit to Your Honor that it is a factual determination.

THE COURT: Well, of course what you're saying is true, but it's also true for -- I don't know what the exact number is -- the hundreds of disputes that have arisen between Lehman and counterparties, many of those being in the ADR program, and the adversary proceedings, some of them decided, some of them pending, that go to the question of how properly to interpret what for each counterparty is a set of what they assert to be unique facts.

What distinguishes your situation from their situation? It seems to me not very much, it's just that you have some different facts to allege.

MR. RUEBEN: Well, but the different facts are --

THE COURT: Isn't that true in every case?

MR. RUEBEN: I obviously don't have mastery of all of the cases before Your Honor, but I would say by way of example we're not UBS or any of the major banks. That fact alone would take, us I submit, outside of the vast majority of those disputes.

THE COURT: But are you suggesting that there should be different rules that apply to less sophisticated counterparties?

MR. RUEBEN: I think that there are different facts that are interpreted differently based on the counterparty expertise.

A perfect example. A perfect example is the allegation that Lehman Brothers makes right here saying Retirement Housing Foundation played the market. That is respectfully not supportable at all. As I said, RHF doesn't know how to -- can't play the market and is not essentially allowed to play the market. I think that's a very different factual scenario and undercuts what Lehman suggests, whereas we contend if anyone was playing the market here it would have been Lehman Brothers, they're the experts.

But on a factual basis I do think that my example takes us out of the typical situation.

Moreover, the efforts that RHF undertook in order

to terminate, which are unique to them, and the complex transaction that they were in, does make this particular case different on its own merits. And I submit to Your Honor it would only be a unique determination. There's no way that the determination of termination by RHF could be applicable to the other multitude of cases that Your Honor has referenced.

THE COURT: Well, let's deal with the specifics of your motion, and let's assume for the sake of discussion that the automatic stay applies, and let's also assume for the sake of discussion that you're seeking what amounts to an exceptional ruling, because at this stage in this proceeding you are the only attorney representing any counterparty that is seeking to have the questions surrounding termination of the swap agreement determined in a state court. In fact to stay the question -- to state the question is almost to test everybody's ability to maintain a straight face in the courtroom.

You're talking about having a state court determine questions of termination rights with respect to Lehman Brothers. Do you understand what we're talking about? This is Lehman Brothers.

MR. RUEBEN: I understand, Your Honor.

THE COURT: And you're talking about having a state court in California deal with Lehman Brothers. Why on

earth is that appropriate? Because it seems to me that to state the question takes one to the point of noting how ludicrous the question becomes.

MR. RUEBEN: Respectfully, Your Honor --

THE COURT: That's why I'm asking the question so to press you so that you know how I think about this. I think that you are pushing the envelope where it breaks.

MR. RUEBEN: We're certainly not attempting to break an envelope.

THE COURT: Understand. What you are asking for makes no administrative sense in this bankruptcy.

But make your argument and see if you can persuade me that I should have not only a false straight face but a real one.

MR. RUEBEN: I will make my best effort, Your Honor.

THE COURT: Okay.

MR. RUEBEN: And I hear you loud and clear, but let me take the other point, which is the fact that we are the only one who's making this request. It tends to support the argument that what happens with us will not impact everybody else. Apparently that is worth commenting on.

Now, let's talk about the reality of our facts. The reality of our facts is we have a litigation that's been going on for years in California. We have, as we indicated

in our papers, had multiple proceedings in California because the Lehman swaps are a piece of an entire financing transaction involving other parties, et cetera. I have personally participated, for example, in mediations in California in connection with the matters there as well as in mediation here. And I will tell you, and this I know something about, the way that this case can ultimately be settled is putting everybody in the same port. That's just my experience after years of settling cases.

So one of the enhancements to Retirement Housing Foundation, in fact all the parties, is the likelihood of a resolution. It goes up far, far higher once we're all in the same court.

In addition, the underlying tort claims, which would only be liquidated -- only liquidated, is still subject obviously to the plan and the Bankruptcy Court's determination, will take weeks of testimony and a significant effort to try the matter.

Why is it not as efficient, in fact arguably more Efficient, to let the complex court in California which does this kind of thing and which was set up for this kind of complex case, judges who are very highly respected in the California state system are put into the complex court and they deal with complex cases. They have more facilities and more ability to handle a large and complex trial. That is

in my view a benefit not only to this Court but allows the efficiency of the claim to proceed.

This claim has been going on for a while. We indicated, for example, Mr. Magnone (ph), who's a principal witness for RHF for the Lehman matter and for the rest of the related matters has already been deposed for four days in the case, but his deposition is not completed. It is in the process of being completed.

So we're farther along in the process of litigating that complex transaction.

THE COURT: Yes, but what we're talking about here by your own argument is a relatively tight set of issues that relate to termination.

MR. RUEBEN: You're -- as I said when I started, the first issue before Your Honor is the question of our contention that the termination debt relief claim, as I've describe it seeking just an order of determination, is not subject to the stay. The rest is subject to the stay entirely. And the -- therefore the second issue that we are proposing to Your Honor is to seek relief from the stay to try the whole ball of wax, the whole matter all at once with respect to the state court -- in the state court with respect to all of the claims against Lehman, including the order on termination as well as the tort claims which we have there. Liquidate those tort claim, determine the

termination issue, it then comes essentially back to this Court for adjudication as to how to handle those results.

THE COURT: Did Retirement Housing Foundation file a proof of claim in this case?

MR. RUEBEN: Yes, Your Honor.

THE COURT: Why is this not all part of the same claim process that is being centrally administered here?

MR. RUEBEN: Well, as I suggested to Your Honor, it is certainly part of the claims process. In fact we're -- we are moving on several --

THE COURT: But if it's part of the claims process what is the rationale for having a state court in California take any part of that load?

MR. RUEBEN: Because --

THE COURT: Mr. Klestadt, is there something you want to add?

MR. KLESTADT: Yeah, Your Honor, if I may on that point about the proof of claim.

THE COURT: This is actually usually a one person argument at a time, but in deference to your long experience in this court I'll give you a chance to interrupt.

MR. KLESTADT: Thank you, Your Honor.

MR. RUEBEN: Thank you, Your Honor.

MR. KLESTADT: With regard to the proof of claim, Your Honor, yes, there is an affirmative claim that has been

filed against the estate, and normally that proof of claim would be viewed as prima facie valid, but that would be a static proof of claim, Your Honor, not subject necessarily to adjustment.

Here, Your Honor, Lehman is claiming that the underlying trade is still live. And whether or not the proof of claim that's been filed is an affirmative claim or instead my client owes money to Lehman keeps varying because of the passage of time.

Your Honor, this -- you started the hearing by noting it, this is now the fifth anniversary of the case.

THE COURT: And nobody has yet wished me a happy anniversary.

MR. KLESTADT: Happy anniversary.

MR. RUEBEN: Happy anniversary, Judge.

THE COURT: Thank you very much.

MR. KLESTADT: But, Your Honor, Lehman could choose to “play the market,” if you will, and not bring a claims objection and not bring an action to determine the validity of the termination for another two or three years while Marta petitions may then continue to favor at Lehman even more.

So my client thought it would be appropriate now that the ADR process as concluded to bring the matter before Your Honor to try to move it along. We believe that the

state court is certainly able to do so, but --

THE COURT: I think we should really only have one lawyer arguing at a time --

MR. KLESTADT: But that --

THE COURT: -- and you've gone beyond the clarification that a proof of claim was filed that has been static. I view that as not a particularly meaningful distinction.

The fact is that your client has chosen, as it well should have chosen, to participate in this bankruptcy and is now seeking an exit, which is why you're here, and that exit is blocked by me.

MR. REUBEN: Well, Your Honor, respectfully we did -- we come to you and we are not seeking an exit because we know anything or any adjudication comes back to Your Honor and to the plan. So this is far from an exit from this Court.

What it does do for this Court is allow for the adjudication and determination factually of what happened both in the tort claims that we have asserted and with respect to the termination and then it comes right back to this Court for further appropriate allocation, determination based on the Superior Court in California's actual findings.

THE COURT: Sounds like an incredibly inefficient process you're proposing.

MR. REUBEN: And it really is not, and the reason I say to you it is not is from RHF's point of view -- Retirement Housing Foundation's point of view we're doing it all any way in the California court. It's all coming in, all the evidence, all the witnesses, et cetera.

THE COURT: Well, it's all coming in in the context of a litigation that you started against non-debtors.

MR. REUBEN: Correct, Your Honor, absolutely.

THE COURT: Which was your right, but it's not necessarily the obligation of this Court to throw another ripe defendant in front of you.

MR. REUBEN: It's not an obligation obviously of this Court, it's this Court's determination as to what is appropriate, and we would submit it is appropriate because it is a far more efficient process to not have this Court have to determine any of the same factual determinations again after the Superior Court in California determines them with respect to Lehman. Two trials is less efficient than one.

THE COURT: Can you address the Sonnax factors?

MR. RUEBEN: I have tried to do that to a large extent in this argument, but I'll make the point that this we contend is unique, it is a factual case that won't impact anyone else.

I'll give you one simple example of that. The tort claims and one of the defenses to the swap contract, all prepetition by the way, so it is subject to your jurisdiction, are based on California fraud claims.

California fraud requires by way of example reliance. The reliance of RHF is a unique factual determination.

I would submit that the California court not only it's not a convenience, although convenience is a factor, but is more capable of determining reliance, and the reliance of RHF has no impact at all on any of the many matters that are before this Court.

So by way of example the determination in California would not have an impact on any other bankruptcy matter.

Moreover, we simply seek to liquidate the claims. That is a determination that would make it more efficient and give to Your Honor the liquidated claims to rule as you feel appropriate.

THE COURT: Well, you must know this, my job is to liquidate claims, that's what I do.

MR. RUEBEN: I understand and I respect that Your Honor not only liquidates claims but manages the entire estate.

What I'm suggesting to Your Honor, as I indicated

earlier, is that the liquidation of claims can also be handled by another court and unique facts and provided to Your Honor to deal with the result. That's a more efficient process.

And I will repeat once again if I may, the mediations in both cases have failed.

THE COURT: By the way that puts you in a very special category. That means you represent a party that is in the distinct minority relative to the entire ADR program that has been running with remarkable success here, and that factor alone, which I don't hold against you, does not put you in the best light right now. Because ordinarily parties that engage in ADR settle and they settle because they're acting reasonably.

Because Lehman has been so successful in resolving so many of these claims in ADR that's a very strong indication that Lehman is not the impossible party and it suggests strongly, but of course I make no finding here, that you may be representing a particularly difficult client, or perhaps you're particularly difficult.

MR. RUEBEN: My wife would agree with that, but putting that issue aside, Your Honor, I have represented this particular client for over 20 years, I have settled for this client almost all of the cases for them, and I pride myself in settling in ADR or in mediation, it is a normal

process. That's my representation to you.

One indication about this particular case is the stark disparity between our respective positions where our client we submit Lehman owes us in the 5 million to $10 million and Lehman says that we owe them $50 million. That's a big bridge to cross.

THE COURT: It is, but in the context of this case with all respect it's not a lot of money.

MR. RUEBEN: It's not a lot of money in the context of this case, Your Honor, but that is why for our client it's everything.

So understanding that we are not Bank of America, UBS, whatever, we are just a small charity that tries to provide senior housing. That kind of disparity is massive for us.

THE COURT: Is it a 501(c)(3) organization or is it simply a non-profit corporation?

MR. RUEBEN: 501(c)(3).

THE COURT: Okay.

MR. RUEBEN: And with respect to what I've submitted to Your Honor about the Sonnax factors, I would suggest that it is obviously Your Honor's determination, but the uniqueness of this situation is a big massive process, this Lehman five year continuing thing that Your Honor has been handling, there are going to be unique situations that

come up that justify special treatment, and we are respectfully trying to submit to Your Honor that this is one such example.

And I will tell you that -- and I reaffirm this point -- that the likelihood of resolution is so much enhanced when you have everybody in the transaction in one big mediation, and that has been my experience over and over again. Things don't always settle the first time you go to mediation and sometimes you have to bring in the other people, and that's why we have these complex mediations.

But settling just with Lehman with this disparity would -- was a challenge given the respective positions.

THE COURT: All right. We don't have to -- we don't have to spend more time on the mediation aspects of this.

Is there anything more?

MR. RUEBEN: Your Honor, we have adequately argued our points in the papers and I am certainly prepared to respond to Your Honor, but I have tried my best to explain our position.

THE COURT: Okay. Fine, thank you, Mr. Rueben.

MR. RUEBEN: Thank you.

Mr. Slack?

MR. SLACK: Good morning, Your Honor, Richard Slack from Weil, Gotshal.

And let me start by saying the courtroom looks great and --

THE COURT: Thank you very much, I agree.

MR. SLACK: -- happy to be here finally after spending at least a few months in the other courtroom. So congratulations.

Your Honor, I'm going to try to be somewhat brief and try to be responsive as much as I can to the arguments that were made.

The first thing is that Retirement Housing talks about the termination issue as if it's a state court issue, when in fact what's really going on here is that Retirement Housing seeks to have a California state court decide several core bankruptcy issues instead of this Court.

In particular Retirement Housing wants a California court to decide whether its attempt to terminate nine months after the bankruptcy is protected under the bankruptcy safe harbors.

Now certainly there will be facts that go into that, but it is essentially a bankruptcy issue and not a statewide issue as to whether or not the termination here is appropriate.

And what makes that issue it seems to us particularly egregious is that this Court has already addressed that topic, putting aside for the moment the

argument that we think the Metavante decision applies here. Certainly this Court has already addressed this topic and has ruled at least as a matter of the safe harbor that a termination needs to be done fairly contemporaneously with the bankruptcy in order to have the protection of Section 560 of the Bankruptcy Code.

This Court is so obviously the right court to decide whether that ruling applies to Retirement Housing that it's frankly hard to fathom any basis for an argument that a California state court should either be interpreting the bankruptcy safe harbors or applying Metavante.

Now, one of the things that we spent some time listening to in argument and certainly dealing within their briefing was this take that Retirement Housing tried to paint of Lehman saying that somehow -- and they say in their motion -- quote, "Lehman did not actually provide notice of any such purported dispute until March 2012," and then in their reply they state "that Lehman did not take any action" -- and that's a quote -- "did not take any action regarding the invalid termination with Retirement Housing." That's just not true.

What happened here is that immediately after their Termination, nine months after the fact, Lehman sent a letter. That letter was unambiguous in stating that the termination in Lehman's view was invalid under the

Bankruptcy Code. It didn't say maybe it's invalid, it says it is invalid. That certainly had to put Retirement Housing more than on notice that there was an issue here.

Lehman then sent invoices, you owe us money under the live swap.

Now, in their reply they say, well, Lehman only sent three months of invoices.

Well, first thing, Your Honor, as you know the issues that Lehman faced in trying to get out invoices, but it begs the question, how many invoices did they need? Were they going to pay if they got four or six or eight? The fact is Lehman sent three months of invoices and maybe more. And they understood what they mean because their lawyers wrote back and said, hey, these swaps are terminated we don't -- we don't owe you the money. So they understood there was an issue with termination.

Lehman then had a voluntary exchange of Information, which Your Honor I think recognizes as the preferred method for everybody here if we can do that, including information related directly to the nine-month delay that they had in terminating.

There were communications between the principals, and then there was a stipulation relating to the assumption motion. Because one of the contracts that Lehman seeks to assume is the Retirement Housing swap, and in that the

stipulation specifically says that Lehman is disputing the validity of the termination.

And finally, Your Honor, in this time when they say nothing is happening we had a mediation under the court-ordered mediation process, and the fact that it failed I think, Your Honor, is a rarity.

You know, you get the reports from the estate and from the mediators every month, and I think from the last report of the completed mediations the success rate is over 90 percent.

So frankly, to call the mediation process essentially nothing as if nothing is happening for four years is insulting to the Lehman employees who spent the effort preparing for it, attending, and participating in the mediation, and frankly the Court which adopted the process.

Your Honor, I would state that with respect to the argument here there is really two issues I agree.

The first issue is whether the automatic stay applies. And the second is whether if it applies whether the Court should lift the stay to allow them to proceed.

With respect to the automatic stay applying I would just point out, Your Honor, that the Enron case is really right on point here, and the argument that Retirement Housing makes in their reply is essentially as follows. Because they believe that it falls under the safe harbor 560

the idea of terminating then they should be able to bring a lawsuit challenging that termination without violating the stay. And I would suggest, Your Honor, that that is absurd.

The idea that anybody who believes that the safe harbors don't apply can then bring those cases anywhere outside the Bankruptcy Court makes absolutely no sense.

Your Honor, moving to the Sonnax factors and the specific issues here.

There really are -- you know, while we go through all the Sonnax factors, Your Honor, and we have a chart which we attached to our brief as Exhibit 3 which I think is a good road map, at least from our perspective as to apply the Sonnax factors, it's clear that a couple of the Sonnax factors really overwhelm in our view the decision here.

The idea that factor 2, which talks about the lack of any connection or interference with the bankruptcy case.

Well, it's absolutely clear that the declaratory judgment that they're seeking on the validity of the termination goes right to the heart of many of the issues that Your Honor has dealt with over the years, including the Metavante type of issues, and we think that factor certainly overwhelms.

Similarly factor 10, which talks about judicial economic, I think in that same vain, Your Honor.

There's no question that Your Honor with the experience that you have in dealing with derivatives and in order to have frankly consistent results amongst all counterparties it makes sense for Your Honor to make the decisions with respect to the bankruptcy safe harbors and the application of the bankruptcy safe harbors.

Now, with respect to what I call the tort claim, the idea that they want to bring Lehman into a case in California that's ongoing effectively. Your Honor, I would say the same two Sonnax factors really overwhelm the decision here.

The first, Your Honor, which I think is important, is that the only way that LBSF and LBHI can gain any consistency and security in a decision is for Your Honor to be deciding issues relating to Repo 105 and the like.

Because let's say LBHI and LBSF get sent to California to litigate, and let's say that we win, now somebody else brings a lawsuit relating to Repo 150 which affects a number of different counterparties or anybody who has a contract with Lehman over the two to three-month period potentially could make these kinds of arguments, Lehman would have to and LBSF would have to relitigate that either in this court or another court. And the only way to have consistent decisions on that issue for Your Honor to be the one to decide.

And it even works if Lehman loses it they get all the risk but none of the benefit. Because if you lose it as Your Honor knows people are going to be arguing that that decision is collateral estoppel.

So Lehman gets all the risk if you send us to another court and none of the benefit because we'd have to litigate over if we win.

Similarly, Your Honor, in terms of, as Your Honor Noted, there's a proof of claim process here, and what they really want to do is jump the line. There's no reason why these proofs of claims can't be decided along with every other proof of claim in the case, and they've made no justification for essentially jumping the line here.

And it's particularly egregious, Your Honor, when they admit and concede that they're going to have to come back to this Court any way to decide issues such as setoff.

One last I think very important point that we talk about in our briefs. The complaint at issue here, especially on the tort claims, alleges that LBHI, LBSF, and all the other Lehman entities are alter egos with one another. The complaint really can't survive without being able to attribute the conduct of, for example, LBI to LBHI and LBSF, and that's because it was LBI that actually sold the notes that are at issue that they're saying they were defrauded on.

The alter ego issues are integrally related to the bankruptcy plan whether you have separate debtors, but also to the real estate leases that were issued between LBI and LBHI in a settlement.

And also, Your Honor, there's bankruptcy law that says the alter ego claims belong to the debtor, not to them.

Those are issues that Your Honor should decide and needs to decide, not a California State Court.

So at the end of the day this complaint is so intertwined with the plan and with bankruptcy law that there's no way that a California state court should be the one deciding it.

Your Honor, though I don't think it is the critical point here I have to -- I have to make one last comment.

Throughout their papers and -- they make a point that it's going to be difficult for them to litigate in New York, that there's all these witnesses in California, et cetera, et cetera, and they have an affidavit with all these complaints that they filed in California, et cetera. The one complaint that they don't submit to the Court is about a 100-page complaint filed in the Southern District of New York by Retirement Housing that relates to the Repo 150 issue.

They clearly, Retirement Housing, is going to be

litigating and they're actively litigating in the Southern District on the Repo 105 issue against other defendants. And not only is it obviously not inconvenient for them, but the MDL, which sent this case here, obviously believes that it's efficient to have the Repo 105 issues decided in the Southern District.

So yes, there is a case in California with a lot of state law claim, but Repo 105 there's a huge case in the Southern District. Retirement Housing is actively participating, the witnesses are obviously showing up, counsel here at the table are showing up, it is simply not a burden to have a court in the Southern District decide critical issues of bankruptcy law, which is what this case is all about.

So thank you. Unless you have any questions, Your Honor.

THE COURT: Thank you.

Mr. Reuben, do you have anything more?

MR. RUEBEN: Just a few points, Your Honor. Thank you for the time that you've given to this matter. Let me start with the last one first.

The multi-district litigation, that particularly case was originally filed in California, sent to the District Court here through the multi-district panel process. At the end of discovery and summary judgment, as I

understand it, it then goes back to California for trial.

So the fact that we were required to come out here didn't keep us from proceeding in that matter, but it goes back to trial in California any way.

However it does lead to another point that counsel made, and that is the Repo 105 issues.

Repo 105 issues are being litigated in the multi district matter. The Repo 105 issues are against Ernst & Young and there are many cases involved. There's class action and that kind of thing, as well as individual laymen defendants who are not part of the debtor, they're the individuals.

Therefore, the Repo 105 issues will be litigated in multiple jurisdictions in each of those particular matters unless all of the cases get dismissed pursuant to summary judgment or something like that.

To suggest -- and the repo 105 issues will be litigated in the California court as well.

So to say that the Repo 105 issues are unique to this court is not accurate.

The other thing I might add to that is that a determination or a win shall we call it by my client in the California court is not in any way applicable to any other potential plaintiff because of the unique requirements that as I suggested reliance by the individual, the California

court, the California state actions require individual reliance, there's no fraud on the market theory that's available. So there's no possibility that the California determination can impact what is here in this court or other cases for that matter.

I should add perhaps the point about jumping the line. We only came to this Court after five years with respect to this because of Lehman's position on the termination. We felt we're not trying to jump the line and we've never come to this Court before this time, but we do believe that Lehman's position is in the effect of playing the market and it is appropriate with the plan done with five years and that the stay be not used as a sword against us, and that's what we contend is happening here.

And let me conclude if I can with a question. The question which is, under the bankruptcy provision that allows the narrow exception to the automatic stay here, that is the determination, acceleration, et cetera exception, how is it to be determined in a situation where there is a termination based on our position and they dispute other than seeking through an adjudicatory process the result? And why isn't that a necessary element of termination and therefore not suggest to the stay?

With that, Your Honor, unless Your Honor has more questions we submit.

THE COURT: Okay, thank you.

It's interesting that this argument occurs on the morning of an omnibus hearing. I note from the agenda it is the 64th omnibus hearing in these cases, that includes in the afternoon session a number of adversary proceedings, and the adversary proceedings do not directly touch on this issue but are consistent with the consolidation of proceedings in one court with reference to the orderly administration of the Lehman estate.

If anything the passage of time has in my mind made it even more critically important that there be a centralized approach to dealing with the many and sundry legal issues that have arisen within these cases and that still need to be addressed.

Perhaps most convincing to me in this morning's argument is the reference to Section 560 of the Bankruptcy Code, which is the safe harbor relating to the right to liquidate, terminate, or accelerate a swap agreement.

The Metavante decision has been referenced in Passing, and the degree to which it is applicable to the present dispute does not need to be identified for purposes of this bench ruling other than to say that it is one example of how this Court in the last five years has been asked to deal with any number of issues that have arisen under the safe harbors as to which there is no controlling

precedence but for the decisions that had been made here.

I say that to note that there is an integrity aspect to this that needs to be observed, and that is not to say that I am the last word on this subject; far from it. I am however the starting point in a process in which safe harbor determinations percolate through the federal system.

I am reminded as I speak to you of a decision that I rendered in a completely unrelated case, Quebecor, in which I interpreted in the context of some litigation 546(e), that decision was appealed to the District Court and affirmed and appealed to the Second Circuit Court of Appeals and affirmed.

What it demonstrates is that from a systemic perspective it is appropriate for issues relating to these provisions of the Bankruptcy Code to be addressed within the federal system, and I believe it highly inappropriate for matters of this sort to be sent to any state court, no matter how sophisticated.

Largely for that reason the request made by motion of the Retirement Housing Foundation and its affiliates for various determinations relating to the automatic stay and seeking the right to pursue litigation in California is denied.

It is denied not only for the reasons that I have stated in reference to the safe harbors, but also in

reference to jurisdiction economy and concerns as to the uniformity of application of the law in this the largest bankruptcy in history.

I heard and considered the arguments made by counsel for Retirement Housing Foundation that the facts applicable to the termination of this particular swap are one of a kind. That may be, but every other counterparties' attempts to somehow distinguish itself from governing law as it has developed similarly are based on unique facts.

The underlying documentation, the ISDA standard form, is the same in virtually every one of these cases. The question of whether or not the automatic stay applies for purposes of Section 560 happens to be a question that I had previously addressed, and that was addressed in the Metavante case.

But perhaps most importantly it is sensible from a case administration perspective to avoid having any of these issues broken off into separate litigations in separate parts of the country.

The fact that there is an MDL relating to Repo 105 pending in the Southern District of New York is an example of how our system functions to promote efficiency.

In appropriate cases it makes sense for litigation to be consolidated, and in the case of bankruptcy practice generally consolidation is the norm. It is the norm because

Congress has determined that bankruptcy in particular is one of those legal disciplines where it makes sense for a single court to exercise broad jurisdiction, albeit limited by Article I of the constitution.

For these reasons the motion is denied.

MR. REUBEN: Thank you, Your Honor.

MR. HORWITZ: Thank you, Your Honor.

Maurice Horwitz, Weil, Gotshal & Manges on behalf of Lehman Brothers Holdings, Inc.

The next item on the agenda is the motion of RBC Dominion Securities, Inc. to compel Lehman Brothers Holdings, Inc. to reissue checks for allowed claims.

Counsel to RBC should be -- is here, I'll turn the podium over.

MR. SLACK: Your Honor, if I may could I be excused at least until this afternoon?

THE COURT: You may be excused until this afternoon.

MR. SLACK: Thank you, Your Honor.

MR. FRIEDMAN: Good morning, Your Honor, Jeff Friedman of Katten Muchin Rosenman for RBC Dominion Securities, Inc., and my colleague, Kevin Baum, is at counsel table with me.

Your Honor, RBC Dominions Securities has an undisputed allowed claim in this case for approximately

$5 million against LBHI based on guarantees of securities issued by LBHI's affiliates. RBC also has allowed claims based on so-called program securities issued by LBHI.

In April of this year RBC received at an address different than the one in its proof of claim a notice from Epiq on behalf of LBHI, that the time to request reissuance of a check that Epiq had sent to RBC in October 2012 was going to expire on March 30th, 2013. That letter was purportedly originally sent to RBC in January of 2013 and was resent to this different address in mid-March.

When RBC contacted Epiq to look into getting the check reissued RBC learned for the first time that two checks purportedly had been sent to them representing the first two plan distributions on the allowed claim. One for about $183,000 in mid-April of 2012 and then another about five and a half months later for about $124,000.

RBC in declarations from both the individual addressee on RBC's proof of claim and from the individual whose group at RBC would ultimately be responsible for negotiating the checks for bankruptcy claims such as these state that they did not receive either of the two checks. And frankly, Your Honor, following an investigation we don't know why that's so.

The one inference I think can fairly be drawn from those affidavits and from our own investigation is that

nobody at RBC opened envelopes with checks for 183,000 and $124,000 in them, saw the checks, and did nothing about them. And that's about all I can say in terms of explaining what might have happened. There are numerous possibilities as to what happened with the checks.

There is, Your Honor, a provision in Section 8.9 of the Lehman plan confirmed by this Court that provides if a distribution check isn't cashed within 180 days of its issuance the amount represented by that check is forfeited.

By the time RBC finally learned that it was missing the two checks the 180-day periods for both checks had already elapsed.

After some back and forth with Epiq by RBI personnel it became clear that Epiq and Lehman believed that they could not reissue the missing checks to RBC absent an order of this Court, and so RBC engaged our firm to file this motion, and RBC by this motion seeks the reissuance of the checks for money which Lehman doesn't dispute that RBC would have been entitled to and had we caught this in time checks would have been reissued.

We believe that it is appropriate to evaluate the relief we seek under an excusable neglect standard.

Clause 2 of Bankruptcy Rule 9006(b)(1), which we discuss in the motion, clearly gives the Court discretion to grant relief under an excusable neglect standard.

We believe that RBC satisfies this standard under either the Pioneer Investor Services case from the Supreme Court or under a slightly more lenient standard that this Court has used with respect to motions to reconsider disallowance of claims, which is the test in the American Alliance case, which was a case decided by the Second Circuit subsequent to Pioneer and which we cite in our reply.

We think because there was a timely filed claim by RBC that was allowed but now effectively as to the two missing payments it's been effectively disallowed that the American Alliance test is perhaps a more appropriate test to excusable neglect. Nevertheless we think we can satisfy either Pioneer or American Alliance.

The Supreme Court in Pioneer noted that the Court's determination of whether excusable neglect exists is quote, "at bottom an equitable one taking account of all relevant circumstances surrounding the party's omission."

There are four factors that Pioneer uses and three factors that American Alliance uses in determining whether excusable neglect exists.

Pioneer focuses on the length of the delay in seeking the relief we seek here; whether the reason for the delay was within the control of the entity seeking the relief; whether the entity acted in good faith; and whether

there is prejudice to the debtor.

American Alliance looks at whether the reason for the delay was willful, i.e., something more than mere negligence; whether the claimant would have a meritorious defense if the motion were granted; and whether there is prejudice to the debtor.

LBHI in addressing these factors focuses most heavily on the length of the delay suggesting that RBC waited some 15 months to file this motion because that's when the mailbox rule would deem RBC to have received the first check.

As RBC points out in its reply, however, the mailbox rule is not really at issue here because the excusable neglect doctrine assumes that the relevant notice was actually or constructively received, otherwise there would be a due process issue and the Court wouldn't have to reach excusable neglect.

So as a matter of common sense however, Your Honor, a Rule 9006(b) motion based on excusable neglect is never made until after the moving party realizes that there's been an error, that there's been some omission.

Judge Lifland in the FairPoint Communications case cited in our reply and Judge Gropper in the Journal Register case cited in our reply found that motions filed promptly after actual knowledge of the failure satisfied

that prong of the test. And as I indicated, RBC, as soon as it received the second attempted notifying that it was about to lose a check if it didn't request reissuance in time acted very promptly, and I don't think that's seriously in dispute, and once they went through their internal investigation that started in April, spoke with Epiq, they hired us to file this motion.

THE COURT: Can I ask a very basic question? One of the things that has been very heavily publicized since the Lehman plan went effective in March of last year has been the timing and the amount of distributions to parties in interest in the case. Even people who aren't receiving distributions have paid attention to the fact that there were distributions being made as of particular times during the year in 2012.

How is it that RBC apparently ignored the fact that it was due a distribution and then didn't find it? That's something that just amazes me.

MR. FRIEDMAN: Your Honor, let me address that, because that was going to be my next point, which is whether the delay was somehow within our control, because Your Honor asked the same question I asked, which is how could you not know --

THE COURT: How could this have happened?

MR. FRIEDMAN: Right. And we asked that same

question.

Again, Your Honor, going back to the notion that we just don't know what happened to these two particular checks, I do want to address that, because I think the answer to Your Honor's question is the very reason I think excusable neglect exists in that state -- in this case.

LBHR argues that the reason for the delay was within our control because the distributions were announced on the website maintained by Epiq, Therefore, according to LBHI, RBC should have been on the lookout as Your Honor suggests for distribution checks.

Putting aside that there is no legal compulsion and it wasn't formal notice of these distributions, but as you just said publicity --

THE COURT: I read about it in the newspaper.

MR. FRIEDMAN: Well, but again, the timing is not really the issue as you'll understand in a moment.

So that there was no particular reason RBC had to look at the Lehman website, and whether they did or didn't I don't even know, but I do know this, and that is until it received the third distribution check from Lehman on its claim in April of 2013 every distribution in respect of RBC's bankruptcy claims in these cases and in proceedings in foreign jurisdictions came to RBC by a wire transfer. So it was simply not obvious to RBC that it was missing the two

checks that it was missing here.

So whatever neglect may exist here because RBC failed to figure out it was missing the distributions represented by these two checks on its guarantee claims, whatever that was it certainly wasn't willful. They had no desire not to get their money as soon as possible.

More to the point, Your Honor, some of these wire distributions, the wire distributions inspect to program securities issued by LBHI came on the distribution dates in April of 2012, October of 2012, and April of 2013.

So the mindset at RBC and, I'm not saying there was no error, I'm saying they shouldn't have been more careful, but the mindset at RBC was we're receiving wire transfers. Nobody was looking for checks. And until they got the notice that the checks had been issued, which was too late, nobody knew that they were looking for checks on the claims based on the guarantees by LBHI.

THE COURT: Okay. Thanks.

MR. FRIEDMAN: Okay. They've received 19 wired in total and one check in respect of its bankruptcy claims prior to making this motion.

So we think both of those factors explain the delay and that the delay factor under either American Alliance or Pioneer favors RBC's position.

Both Pioneer and American Alliance, Your Honor, do

both take into account prejudice to the debtor, and LBC makes two arguments on prejudice, and I don't think -- I don't think they really believe there's serious prejudice to the estate if the estate has to rewrite these checks for $300,000 or thereabout.

And the first is that if the Court grants this motion the floodgates will somehow open because there are other uncashed checks. And to that I can only respond, Your Honor, that excusable neglect is a fact specific analysis and we can't speak to the circumstances surrounding the uncashed checks of any other recipient.

But to our knowledge, and I think LBHI will agree, this is only the second motion of its kind made in this case.

And that turns us to LBHI's second argument, which is that sometime in the future LBHI says they may not have the financial wherewithal to reissue checks, and that's true. At some point, we're not there yet, but at some point in the future it will have liquidated the claims, finished the litigation, and really be down to its last few dollars in terms of a distribution and it won't be possible to reissue a check. But they don't seriously contend that that's the case now. They acknowledge they're sitting on billion of dollars, there are thousands of claim disputes, and they can afford to reissue this check. It's not -- it's

not a money issue and it's certainly not, you know, an issue of the equities.

So we don't believe that there is really prejudice to the estate on the facts here. They're not -- we don't believe the floodgates will open and we don't believe that the cost to the estate is a factor here.

Now the remaining Pioneer factor, Your Honor, is good faith, and LBHI isn't contesting RBC's good faith here. RBC, as I said, has every reason to want to receive distributions to which it's entitled as quickly as it can and acted promptly as it could once it had actual knowledge that it was missing the distribution checks.

You know, looking at the third American Alliance factor, Your Honor, which is whether RBC has a meritorious defense that justifies reconsideration, RBC has an undisputed allowed claim for $5 million.

So we think whether excusable neglect is tested under Pioneer or under the Second Circuit is a somewhat more lenient test in American Alliance that this Court has used, RBC has met those tests and the factors militate in favor of the Court granting relief to RBC.

And in closing, Your Honor, I'd just like to come back for one moment to the Supreme Court statement in Pioneer that the determination for granting relief under the excusable neglect provision of 9006(b) is an equitable one.

Although we recognize what Section 8.9 of the plan states no one has suggested that the results sought here by LBHI is in any sense of the word equitable. Neither other creditors of the estate are banking on this money, nor were the debtors counting on this money, this is RBC's money, and if the Court denies the motion it's eventually going to be reallocated and almost unnoticeable to other creditors and will simply be a windfall for them that nobody was expecting. Nobody is buying claims in this case, nobody is holding claims in the hopes that people won't cash checks.

You know, and by way of an anecdote on this point, Your Honor, my firm is currently representing a debtor in a case before Judge Gerber where there's some 50,000 consumer creditors who received one-half percent distributions on their claim, 10, $20 checks. Four years into it we were reissuing checks even if people told us they had the check. They didn't deny receiving it, they just forgot to cash it. We thought it was the right thing to do, the creditors' committee thought it was the right thing to do, and we've reissued over 200 checks in that period. The administrative cost to our estate, which is significantly smaller, was simply negative.

THE COURT: I appreciate the anecdote, but it may be that an individual is a more sympathetic character than RBC.

MR. FRIEDMAN: Well, Your Honor, again if RBC knew it was looking for checks it probably would have been more careful, and if there is some negligence here that's about the only place I could really find it, and I think that negligence on the facts where they had been receiving wire transfers is excusable.

You know, Section 8.9 of the plan is one of those plan provisions that finds its way into a plan that's virtually impossible to object to at confirmation. If someone walked into Your Honor's courtroom in confirmation and said, well, this plan is fine, except that I don't think six months is enough to cash a check. I mean you would have been laughed out of court.

So, you know, there is nothing magical about the six-month time limit that is in 8.9. If Lehman had put 9 months in its plan or 12 months in its plan I don't think the Court would have said boo about it, but I don't think it would have made any difference.

So we think the denial of the motion on the facts here would be an extremely harsh result and at bottom in the words of the Supreme Court an inequitable one.

So we ask that the Court find the existence of excusable neglect on the very specific facts here and grant RBC's motion.

THE COURT: Thank you.

MR. FRIEDMAN: Thank you.

MR. HORWITZ: Good morning, Your Honor, Maurice Horwitz, Weil, Gotshal & Manges on behalf of Lehman Brothers Holdings, Inc. as plan administrator.

Your Honor, these are -- one can't say that Section 8.9 of the plan was drafted for one particular set of circumstances, but these are very much the type of circumstances that this section was drafted for.

First of all there's no dispute -- the plan administrator doesn't dispute that RBC's one claim that currently exists on the claims register, and that is claim number 51231, is currently an allowed claim.

Section 8.9 of the plan only applies to allowed claims. And it's intended to apply in situations when a creditor receives a distribution check and does not cash it within 180 days.

THE COURT: But let's break in on this, because we had -- we had a similar argument in the Traxis matter a number of months ago and my impression is that one of the reasons that the plan administrator is so diligently policing this provision is to in effect avoid waiving it and that by virtue of making an issue out of it each time it comes up to the extent there are checks out there in the pipeline that haven't been negotiated you're not going to be at some point in the process compelled to cover them all by

reissuing checks.

Let's assume that that's part of the thinking, you don't have to agree or disagree with me on this. In the case of RWC they argue we have fact specific reasons to distinguish ourselves from the class of really negligent creditors who show up two years from now and say we want to negotiate our checks. In that sense what's wrong with just agreeing that they satisfy the standard and avoiding what amounts to all this time and trouble spent over the reissuance of checks?

MR. HORWITZ: Your Honor, the plan administrator -- I don't think that waiver is necessarily a concern, but the plan administrator is concerned about fulfilling its obligation following this very complex plan to the letter as best as possible. And the plan administrator does not believe that it has the discretion to make that -- the determination that a party has met the excusable neglect standard.

THE COURT: Let's just say to make your job easier this morning that I'm satisfied based upon the argument just made that while they were negligent and they should have been paying closer attention and they did this over a longer period of time than a really prudent financial institution might be expected to find out that there was a problem, but they acted as soon as they had that ah ha moment and they

can't explain why they didn't get the checks, and let's just say that it's nobody else's money but theirs, because that's clear, and this is happening now in a manner that really doesn't prejudice any other party in interest, and I just said same result in Traxis, they get -- you get to reissue the check, and that way you don't have to continue arguing, will that satisfy you if I said all that?

MR. HORWITZ: Your Honor, I think that the Traxis matter is somewhat distinguishable.

Of course if this Court were to say that this – on these facts RBC is entitled to a finding of excusable neglect the plan administrator would reissue those checks.

THE COURT: I'm going to say that. So the question becomes to what extent do you want to develop the record further for purposes of being able to show it to some other creditor in six months or a year?

MR. HORWITZ: Well that is -- that is the one thing that the plan administrator would need, because we've got -- you know, we've had now two instances of a motion being filed requesting reissuance of a check, but these -- these are not the only instances where creditors have made this request beyond the 180-day period, it's something that happens periodically and the plan administrator does need to know to what extent it can exercise the discretion that the Court is exercising right now in determining that on these

facts RBC is different from some other creditor down the road.

The plan administrator does not reissue checks exercising this kind of discretion unless -- and the only instance I'm aware of -- unless the plan administrator knows that the check was just sent completely to the wrong address. In that case the plan administrator can -- the plan administrator reads Section 8.9 as says that the 180-day period begins running once the check is issued, and if the check was -- we know the check went to the wrong address it wasn't really issued at that time.

So I mean if this is going to be another instance where a creditor has made a satisfactory finding for excusable neglect it's -- it would just be -- unless the plan administrator has more guidance we will likely oppose the next motion that a creditor files, we'll likely tell the next creditor that to request a reissuance you have to file a motion because we don't have the discretion to make that determination.

THE COURT: Well, in effect that becomes an administrative burden, and I'd like to think that in a world in which discretion can be exercised without major adverse consequences by thoughtful parties that are acting reasonably that it would be possible for the plan administrator to be able to make a judgment that particular

facts given the history now of two examples that have been litigated either fit or don't fit an excusable neglect standard for purposes of reissuance.

And in situations of genuine doubt based upon the passage of time, based upon the negotiation of other checks trying to come up with distinguishing factors that might apply, or actual knowledge as a result of some kind of communication with the plan administrator suggesting negligence that borders on inexcusable negligence that there could be some ability to avoid having every single one of these situations become yet another test case. That maybe with enough of these under everybody's belt we can know that some things are out of bounds and some things may be in bounds.

Alternatively, without suggesting that the plan be modified in any respect, because I don't think there's a need for that, it might be possible for the plan administrator to develop a set of guidelines to the extent that anybody seeks to get what amounts to a special expectation from the application of Section 8.9. But these are just random comments on my part in reference to your question.

But the idea would be to avoid or minimize litigation that can be resolved in a conference room or over the telephone as opposed to in here.

MR. HORWITZ: Well, I don't have --

THE COURT: Now you're speechless.

MR. HORWITZ: If I could I could ask another question, but since that's not my place, I'll --

THE COURT: Well, let's do this, I think it's fair -- I think it's fair to say that I'm sensitive to the problem that the plan administrator has, but I'm more sensitive to the problem that RBC has, and so I am going to grant the motion, overrule the plan administrator's objection, and provide that it is appropriate under these circumstances for the plan administrator to issue replacement checks.

MR. HORWITZ: Thank you, Your Honor, I have nothing further. Unless RBC has anything further.

MR. FRIEDMAN: No, thank you, Your Honor.

We did attach an order to our motion, but I can submit it on -- over the web to Your Honor's chambers if --

THE COURT: It probably makes the most sense to coordinate orders through debtors’ counsel, that's the easiest way for me to process them.

MR. FRIEDMAN: Will do, Your Honor. Thank you.

THE COURT: Okay. Thank you.

MR. HORWITZ: Thank you. That concludes this morning's calendar.

THE COURT: Except for the SIPA case.

MR. HORWITZ: Oh, sorry, yes.

(Pause.)

MR. BENTON: Good morning, Your Honor. Jason Benton, Hughes, Hubbard & Reid, counsel for the LBI trustee.

On the agenda today for the SIPA liquidation is the trustee's motion for approval of three orders. Specifically these orders are a motion to establish supplemental procedures for remaining customer distributions; a motion to establish claims hearing and alternative dispute resolution procedures, the vast majority of general creditor claims; and a motion for an administrative expense parte.

The motions and related orders all have a shared goal, Your Honor, that goal is to move from the customer distribution process and directly into the resolution of the general estate as quickly as we can and as economically as we can. And I'm happy to report to Your Honor that there are no pending objections to these motions.

Mr. Caputo from SIPC is in the courtroom today and I can report to Your Honor that SIPC supports all three motions.

We also have Mr. Freelinghousen (ph), the declarant with respect to the customer motion here in case that's necessary.

With that said, Your Honor, as I mentioned these

are unopposed motions and we would respectfully request that the Court enter them.

We're happy to proceed however the Court wishes. I'm prepared to give a short summary of the three motions or me or my colleague, Mr. Saltzman with respect to the customer distribution motion, he could answer any questions you might have.

THE COURT: I have no questions, this is very much a matter of your record to the extent you want to state anything that ends up in the transcript and be able to display it at some future time in the event that there is a question concerning the procedure leading to the entry of these orders, but you don't have to do that on my account. You're pretty much at your own discretion as to what you want to say about each of those motions, so I leave it to you.

MR. BENTON: Well, Your Honor, I think that we've adequately stated what we have to state about it in the papers.

I mean I would say to repeat again that the trustee's goal here with respect to all three of these motions is to put in place a comprehensive plan, to really move from the customer distribution process, and resolve as quickly as practicable the general estate, and we're trying to do that through these motions and in particular through

alternative dispute resolution mechanisms and in organized and hopefully an economical system with respect to claims hearing and mediation and negotiation.

THE COURT: Well, as to each of the three uncontested matters that you have identified I'm prepared to enter orders without further discussion. I leave it to the parties if they wish to say anything more, but otherwise I'm prepared to simply enter the orders and we can adjourn, but I leave it to you if you wish to prolong this morning's hearing.

MR. BENTON: No, thank you, Your Honor.

I would note just for the record we submitted with respect to the administrative expense bar date motion a revised order on Monday. We also with respect to the supplemental customer distribution motion submitted a revised order yesterday. And in fact since the -- since we submitted that revised order we've been in communication with another customer and so we have a revised order to submit today removing one more customer from that list.

THE COURT: Fine. Okay.

MR. BENTON: Thank you very much, Your Honor.

THE COURT: Thank you. With that we're adjourned.

(Recess.)

THE COURT: Be seated, please. Good afternoon.

MR. SLACK: Good afternoon, Your Honor. Richard

Slack from Weil, Gotshal for LBSF.

Your Honor, the first matter on for this afternoon's hearing are motions for summary judgment by both LBSF and Michigan State Housing Development Authority sometimes referred to as MSHDA in connection with adversary proceeding 09-01728. And the primary issues on both motions before the Court are one, whether a provision in a swap agreement that plainly and unambiguously alters the rights of LBSF based on LBSF's bankruptcy filing is an invalid ipso facto clause, and two, whether that clause is saved by Section 560 of the Bankruptcy Code, the bankruptcy safe harbor.

Specifically, Your Honor, the offending clause here unambiguously changes the methodology for determining a settlement amount upon termination of the swaps. The clause is completely unnecessary to allow MSHDA to terminate the swap at issue. In fact MSHDA unquestionably has terminated, they have actually terminated. And there's nothing that prevents the parties from determining the settlement amount.

The issue here is not whether parties can take the act of determining the settlement amount, the issue is whether the parties use one methodology or another for doing that.

As such the clause is a classic ipso facto clause along the lines that this Court has already invalidated in

Metavante and B&Y. And in both of those decisions the Court found the clauses that were triggered based on Lehman's bankruptcy were invalid ipso facto clauses.

The primary issue, we think today, concerns the safe harbor and the scope of the safe harbor 560 of the Bankruptcy Code.

As I will discuss there are three legs, all of which support LBSF's position here concerning the scope of the safe harbor. The plain language of the safe harbor, all of the cases, literally each and every case that has interpreted the safe harbor, and finally the legislative history, which sets forth the purpose that the safe harbors have. And at the end of the day none of those three legs, the plain language, the cases, or the legislative history support an interpretation that's forwarded by MSHDA.

The safe harbor itself does not talk about protecting the methodology used to calculate settlement amounts, no case holds that the methodology for determining settlement amounts is safe harbored, and the legislative history, as we'll go through, talks about a number of very specific problems that the safe harbor was designed to solve, and none of those specific problems when we go through the safe harbor deal with the methodology for determining settlement amounts.

THE COURT: I hear you, Mr. Slack, although I

might as well tell you right at the outset this is one of the more subtle questions on the ipso facto issue to be presented in the last five years, and it's a very interesting question, and I will note that this is the one and only time in any Lehman case that my decision and Latoya Jackson has been cited by any party.

(Laughter.)

MR. SLACK: Your Honor, I think that -- I think this is a, as you say a solid question, but I think at the end of the day it's a clear question.

The facts necessary for determining whether the modification clause is an ipso facto clause and whether it's protected by the safe harbor are not in dispute.

The background of the relationship between LBSF and MSHDA is set out in both our memorandum of law and in the accompanying declaration of Locke McMurry (ph).

Briefly, Your Honor, MSHDA and Lehman Brothers’ Derivative Products, sometimes referred to as LBDP, entered into an ISDA master and pursuant to ISDA master entered into 20 interest rate swap transactions.

Because LBDP was a triple A rated derivatives trading vehicle there were unique provisions that were written into the swaps with LBDP, and in particular the credit agencies required that in order to maintain its triple A rating LBDP was required to have provisions in the

swaps for the termination and settlement of all the transactions at mid-market, and that included -- and those were upon the currents of certain triggering events, which included bankruptcy filings of LBDP and LBHI.

Thus LBDP and MSHDA had agreed in the swap agreements that if there was a termination event based on a bankruptcy filing that the swaps would be unwound on a close of business mid-market basis. That was before the bankruptcy filing.

On September 15th, 2008 LBHI filed its petition and that event constituted a trigger event under the swaps with MSHDA.

On September 15th had the swaps been terminated, and had the mid-market calculation that was set forth in the agreements been applied, MSHDA would have owed approximately $52 million to LBDP.

Now, rather than terminate and owe a large termination payment MSHDA instead opted to enter into an assignment agreement with LBSF such that the swaps were all signed from LBDP to LBSF and continued unterminated. Thus the assignment agreement actually allowed MSHDA to avoid a $52 million payment to LBDP.

Now, it may help, Your Honor, I have a chart, nothing more than the assignment agreement language, if I could approach.

THE COURT: I think Mr. Goldblatt is -- would like one as well.

MR. GOLDBLATT: Thank you, Your Honor.

THE COURT: Thank you.

MR. SLACK: Paragraph 2 of the assignment agreement provided quote, "Upon the termination of the agreement as assigned and amended pursuant to the terms hereof and notwithstanding any other provision hereof or thereof, any settlement amount payable by the counterparty shall be determined by LBSF pursuant to Part 1(i)(2) of the schedule for the agreement." And there's an unless.

But what the first part, Part 1(i)(2) of the schedule to the agreement unquestionably there's no dispute is a mid-market calculation of the settlement amount.

So under all circumstances, till we get to the Unless, this clause provides that a mid-market standard is used. But there are two exceptions.

And so it goes on and says, "Unless an event of default described in Section 5(a)(1) or Section 5(a)(7) of the agreement has occurred with respect to LBSF as the defaulting party, in which event the settlement amount shall be determined pursuant to Section 6 of the agreement as if LBSF is the defaulting party."

Those two exceptions are first a failure to pay and second a bankruptcy event.

In those two limited circumstances the mid-market calculation becomes a standard market quotation calculation.

So after LBSF filed its bankruptcy petition on October 3rd MSHDA terminated and applied the provision modifying the methodology for determining the settlement amount under the swap, thus instead of applying the mid-market methodology it attempted to use regular market quotation, and based on that market quotation it determined that it owed only 36 million to LBSF where mid-market would have required a payment of 59 million.

The wind fall to MSHDA in a two-week period is obvious. Had the assignment agreement not been entered into MSHDA would have owed a mid-market termination amount of over 50 million. Two weeks later by virtue of applying a clause that clearly changed LBSF's rights based on its bankruptcy MSHDA took the position that it could save $20 million.

So I'm going to talk now about the -- really what I think are the two issues. The first issue is whether the modification provision is an unenforceable ipso facto clause.

As I just said, Your Honor, the clause here provided for a general rule and then two exceptions, one of which is the bankruptcy. Thus paragraph 2 clearly changes LBSF's rights based on its filing bankruptcy.

And what's interesting, Your Honor, is MSHDA's opening brief on its motion for summary judgment never contends that the clause here is not an ipso facto clause. They make that argument in their reply, but in their opening brief they don't even contend that it's not an ipso facto clause.

Now, in its reply it actually has two arguments that it makes. First it argues that the clause really provides one method for doing things if there's no bankruptcy filing and another method for doing things if there is, and therefore they say there's no change.

First, Your Honor, this argument doesn't withstand the plain reading of the clause itself which clearly has one general rule with two exceptions.

But more importantly, Your Honor, this was already addressed specifically in the B&Y case. In the B&Y case you had a clause again where the party said you had one method for going through the waterfall if there was an event of default where Lehman was in bankruptcy and another where there wasn't, and they said so there's no change, they're just two separate methodologies. And this Court held that where you had a very similar type of clause and trigger provision that in fact it was an ipso facto clause.

The second argument they make about this not being an ipso facto clause is they say, well, there are many

different events, here there are too, but there are other events some of which may be non-ipso facto triggers. I would argue that all of these are ipso facto triggers, since even the failure to pay is likely -- has to do with the financial condition of the debtor.

But let's assume that's true for a second. The fact is, is that just because there are non-ipso facto triggers doesn't cleanse the ipso facto triggers in a clause. And again, Your Honor had already dealt with this type of clause in Metavante.

In Metavante the Court was looking at whether 2(a)(3) of the master agreement was an invalid ipso facto clause, and like here 2(a)(3) stated that if there was an event of default that the non-defaulting party could choose not to perform under the swaps. And the Court found that where the trigger for 2(a)(3) was an ipso facto trigger, i.e., the filing of the bankruptcy, it was an ipso facto clause notwithstanding that there could be other theoretical non-ipso facto triggers for 2(a)(3). And of course that ruling makes a lot of sense.

Parties shouldn't be able to avoid and evade the ipso facto provisions simply by building in non-ipso facto triggers into a clause. It'd be much too easy for counterparties in a contract to alter the rights of a debtor by doing that.

So, Your Honor, the next question is whether this clause is protected by the safe harbors. And as I mentioned there are three legs, and I'm going to talk about each of the three legs separately.

The first leg is the plain language of the clause itself. And again, when I'm looking at this it may make some sense to take a look at the text, the text of the relevant statutory part. May I approach, Your Honor?

THE COURT: Yes.

MR. SLACK: Section 560 only safe harbors, quote, "the exercise of any contractual right", and then it says if you -- a little bit later -- "to cause the liquidation, termination, or acceleration of one or more swap agreements."

The key language here is the phrase “to cause the,” which signifies that the safe harbor covers the act of liquidation, the act of termination, and the act of acceleration. The safe harbor is thus concerned with allowing a counterparty to terminate a swap, it doesn't address the methodology for going so. And MSHDA's argument here is that the safe harbor protects not just the right to terminate, liquidate, and accelerate, but also protects the ancillary issue of the method for determining the amount that you get when you terminate.

Had Congress intended to provide a safe harbor for

ancillary matters it could have done so, it could have written the clause that MSHDA would like. It didn't do that.

In fact what MSHDA is really arguing is that Congress misspoke when it wrote the language “to cause the” before liquidation, termination, or acceleration, and instead what it should have used was the word “regarding.” Had it used the word “regarding” it would have read, any contractual right regarding the liquidation, termination, or acceleration or one or more swap agreements, then it would have covered the kinds of things that MSHDA is saying it covers. But Congress didn't write it that way, they wrote it differently. They wrote “to cause the.” The act of. And it is only the act of which is safe harbor.

Now, when we get to the cases and we get to the legislate earth first history, Your Honor, you're going to see that that's exactly what Congress intended and there was a reason for it based on the public policy.

Now there's good reasons why Congress didn't exempt every contractual right regarding the termination, liquidation, or acceleration of swap agreements.

As this Court has discussed both in the B&Y decision and the Valley Rock (ph) decision, you know, there are great economic incentives prebankruptcy for parties to negotiate ipso facto clauses. It's good for the

counterparties and for the future debtors who don't know they're going to be debtors. People don't like to think that they're going to go into bankruptcy, and those kind of clauses get put in -- you know, get put in pretty regularly. And as this Court knows the Bankruptcy Code is designed to enable debtors in possession to effectively reorganize for the benefit of all the creditors.

The policy here should be to limit the safe harbors to make sure that parties don't get to put in punitive ipso facto clauses into contracts.

Now, MSHDA spends a lot of time in its briefs talking about the dictionary definition of the word liquidate, and what I would say is the definition of the word liquidate, whether it means to calculate or it means something else, and we think it means something else --

THE COURT: Did you --

MR. SLACK: -- but the issue is --

THE COURT: -- did you say what I just think I heard?

MR. SLACK: Whether it means to -- whether liquidate means to calculate or something else.

THE COURT: Okay, you said calculate. Good.

MR. SLACK: Yeah, sorry. I hope I said that, that's what I intended to say.

THE COURT: I hope that's what you said.

MR. SLACK: But the issue is a red herring here. It's completely irrelevant. And that's because the word -- whether the word “liquidation” means calculation all that the safe harbor would protect is the act of calculation, not the methodology for doing so.

Under MSHDA's interpretation of Section 560 parties could put any provision they want into a swap agreement no matter how punitive to the debtor and it's covered by the safe harbor.

And I'd like to consider an example that I think makes the point. Consider a provision that deals directly with the liquidation of collateral. So let's say you have a swap agreement and that swap agreement where one party has posted collateral. There's no question under the safe harbor that parties are permitted to liquidate that collateral as part of -- as part of termination, liquidation, acceleration.

So let's say there was a clause in the master agreement, because as we know there's -- the credit support annex to the master agreement talks about liquidating collateral -- so let's say the parties put a clause in the schedule that says upon the bankruptcy of a debtor the counterparty can take all the collateral, no matter how much -- how much those securities are worth for $1. Under MSHDA’s reading of the safe harbor because that is a

methodology forgetting the collateral liquidator, which clearly you can do under the safe harbor, that methodology is safe harbor.

I would argue that it's not, Your Honor. I would argue that you cannot have a punitive measure that changes the rights of the debtor based on a bankruptcy that goes to the methodology for either terminating, liquidating, or accelerating.

THE COURT: But, Mr. Slack, your use of the term “punitive” and your example almost proves too much. Because what I think the Michigan Authority is saying is that in using -- and I'll use your words – “to cause the liquidation” -- although they certainly don't emphasize the words “to cause” in their argument -- but in using liquidation along with termination and acceleration 560 covers more than just the triggering event of being able to take action but extends to -- maybe methodology isn't the right term -- extends to the means to achieve the result. And if it's punitive I absolutely buy your argument. It becomes indistinguishable from the ruling in perpetual, because instead of having a certain rank and a waterfall it flips. That's punitive. But if there are commercially accepted ways of valuing positions that are generally recognized in the marketplace those aren't necessarily punitive they happen to produce a variance and outcome from

Lehman's perspective in this example, but just because there's a variance doesn't mean it's punitive.

MR. SLACK: Well, it certainly was punitive here, Your Honor, in the sense that the difference between a mid-market calculation and a market quotation calculation was approximately $20 million here. So whether you use the word punitive or you just use the word that it's certainly -- you know, words that it certainly benefited the counterparty here pretty dramatically the point is, is that Lehman's rights were changed by virtue of, and you know, the clause or I should say the ipso facto language in 365(e)(1) doesn't require a punitive change, it just requires a change to the right.

So I happen to think that the word punitive was referring to the fact that it was advantageous and greatly so to the counterparty and nothing more. But I do think Lehman's rights have changed as a result of this clause.

Now, one last point on the plain language of the safe harbor. And if you read the briefs filed by MHSHDA carefully and it -- when it says that liquidate means to calculate they realize that's not enough. In other words, just safe harboring liquidation for them isn't enough.

What they say in their opening brief, for example, and it's on page 1, they say “the case presents an important but straightforward question, whether swap counterparties

may rely on the Bankruptcy Code safe harbor provisions to protect their contractual right to terminate and calculate the settlement payment,” -- and here's the language -- “in accordance with the contract's terms.” In other words, calculating isn't enough. They can -- there's nobody who's saying that the parties here can't calculate, perform calculations, they need the safe harbor to mean more than just what it says on its face. They need it to say in accordance with the contract's terms. They need more. They need to be able to say we need ancillary rights in the contract that are also safe harbored.

THE COURT: But, Mr. Slack, this is actually a difficult linguistic exercise, because if you have a contractual right to liquidate -- and that's actually in the title of Section 560 -- it says, "contractual right to liquidate." And if we just look at those four words it's in the contract. You have a right to do something pursuant to contract.

So one of my problems with your argument as I'm thinking about it is what does it mean to cause the liquidation unless you're doing so in a manner that is prescribed in a writing? It's not just out there in the air some place, it's specified in a contract.

MR. SLACK: Right. So you can't have a contractual provision that would prevent a counterparty from

terminating, taking the act of termination, preventing a counterparty from taking the act of liquidating, or preventing a party from taking the act of accelerating, because those are what is safe harbored.

And what's interesting is when you said the contractual right to liquidate it is not exactly that, right, it is the contractual right to cause the liquidation, and the to cause the liquidation is in fact taking the act of.

When you look at the language here they didn't write regarding liquidation, termination, or acceleration, and that's a very key difference. Because the whole idea of not having ancillary rights -- and we're going to get to the cases because I think the cases give a good example of exactly what we're talking about here and support this.

THE COURT: Okay. I don't want to get in the way of your argument, but I also want to better understand this issue which is frankly troubling me, because when we look at the words, “It's the exercise of any contractual right of any swap participant or financial participant to cause the liquidation,” and I’m just going to stop there. Obviously there's a lot more, but we're focused on know to “cause the liquidation.” Contractual right to cause the liquidation.

What kind of contractual right would there be to cause a liquidation that wouldn't have some specificity

built into it?

MR. SLACK: Well, the question is whether it has specificity built into it, the only thing that is safe harbored is the termination, acceleration, and liquidation, not the -- not anything else.

Because again, if you think about the risk you'd have if you could just build into any clause any change you want as long as it's in a swap agreement, that wasn't what the -- what Congress either intended nor what the cases say.

And so in fact, Your Honor, let me talk about the cases. Every case to interpret the scope of 560 has agreed that the scope is limited to the act of liquidation, termination, and acceleration and not ancillary matters, and the cases that we cite, Calpine, Enron, and of course your own cases in Valley Rock and B&Y, but let's talk about the Calpine case here.

The facts of Calpine are instructive. That's a case by Judge Lifland here in the Southern District. And Calpine had entered into a master purchase agreement with Reliant Energy and executed a forward transaction for the purchase and sale of various energy products there under.

So you had a master agreement, it wasn't a swap agreement, but it was a master agreement.

And ten days after Calpine went into bankruptcy Reliance sent a notice of termination and designated an

early termination date. It then sent a payment letter saying that Reliant was owed two million by Calpine.

Now, under the plain terms of the agreement Calpine had only two days to dispute the calculation. If Calpine didn't respond to the letter within two days it became final.

And so what Reliance sought to do was to enforce this provision which provided a methodology for determining settlement amounts and a process for doing that and argued that Calpine waived its right to dispute this amount by not complying with the contract.

Now, relying on the safe harbor which at that -- which for forward contracts was 556, but it has identical language as Your Honor knows talking about to cause the termination, liquidation, acceleration. The Bankruptcy Court held that it was not safe harbored holding that the safe harbor quote “is limited to enforcing only those terms that trigger termination upon the occurrence of one of the three specified conditions set forth in Section 365(e)(1) of the Code. Accordingly, contractual rights that are merely ancillary or incidental to an ipso facto clause are not enforceable.”

And Calpine presents a case virtually I identical here, because a counterpart there like here argued that this two-day process was part of -- part and parcel of getting to

a number. In other words, they say we couldn't get certainty on our number unless this process was in place. So the only way we get certainty in order to net out and be able to do the things that the safe harbor says we can do is to have this two-day period apply and be safe harbored. And the Court said, no, the process here is not safe harbor. The only thing that's safe harbored is the act of terminating.

Now, the legislative history, Your Honor, we've talked about the plain language and the case law, and both of them I think support a narrow reading of the safe harbor. But the legislative history is equally supportive. And what I'd like to do here --

UNIDENTIFIED SPEAKER: Thank you.

MR. SLACK: Your Honor, I hope this is a helpful aid more than anything else, but what we've put together, Your Honor, if I could approach, is what I hope is the legislative history of 560 both from 1990 and 2005 in one place. It certainly cites what both sides have put in and everything else that we can find with respect to --

THE COURT: Sure, please approach.

MR. SLACK: So, Your Honor, the -- a lot of what we cite, obviously is in our briefs. But what I'd like to do is walk through a couple of parts of what is a very lengthy 1990 legislative history, and a very, very short

2005 legislative history.

So in 1990, when they put in the safe harbor, they had hearings, and if you turn to tab 1, which is the House hearing, and on the first really three pages in is a statement by Senator Heflin, and he starts out by saying, "There's a concern that if one of the parties to a swap agreement files for bankruptcy under the current Bankruptcy Code, the non-defaulting party is left with the substantial risk, and depending on the size of the swap agreement, could cause a rippling effect which would undermine the stability in the financial markets."

That's --

THE COURT: I don't know Senator Heflin, but just reading those words make me think that somebody else wrote his speech.

MR. SLACK: The important thing here, though, Your Honor, whoever wrote it, there's a theme throughout --

THE COURT: I don't mean to be disparaging of legislative history, it's just that I think we all know a lot more now than we did in 1989, or at least I know a lot more, than I knew in 1989 that -- there's a legislative process in which legislative history is of uncertain value to courts now being asked to interpret the words

But that having been said, please proceed.

MR. SLACK: Well, I think the important thing,

Your Honor, you can put the weight that you think is appropriate on it. The key is, is that it's absolutely consistent with the -- with the plain language and the case law.

And in particular, Your Honor, what the legislature history was concerned with, was the effects on the market as a whole. And the legislative history was not concerned with whether MSHDA got $20 million because they were able to use one methodology rather than another. And this a theme that you see throughout the legislative history.

When you -- if you turn, Your Honor, now the pages at the top are what I'm going to be talking about. This is --

THE COURT: I don't mean to argue with you about what you just said, but I'm just going to give you a real time reaction to it. One could argue that the stability of the financial markets depend, to some extent, on commercial predictability, and that being able to strictly enforce provisions of a contract in liquidation support the swap market and all that goes with it, so that parties on both sides of the trade know exactly what to expect.

MR. SLACK: I think that's right, Your Honor. I don't disagree, except -- what -- except you can't take that too far. In other words, it's clear that Congress did not

say that any term that's in a swap agreement is safe harbor. We know, for example, that even though 2(a)(3) is there and says what it says, this Court has held that that's an ipso facto, even though we have a provision in a -- agreement that essentially modifies a waterfall provision.

We know that notwithstanding that it's in a contract, and that, you know, the parties there again related to a swap agreement, the expectation may or may not have been that they are valid, but this Court has held if it's an ipso facto, so be it, that's where it ends, so.

THE COURT: I stand by those rulings. I'm simply saying that for purposes of looking at this highlighted excerpt from 1989, the opening statement of Senator Heflin, referencing that which would undermine the stability of the financial markets is a broad enough reference that it could actually support the argument made by your adversary.

MR. SLACK: I think that in context, that's not the case. And I think that when you look at the legislative history, there's nothing in the legislative history that suggests that Congress was worried about changes within the swap agreements, changing rights as opposed to the act of terminating liquidating and accelerating.

And, in fact, Your Honor, the next thing I was going to go was if -- they had testimony from a number of witnesses, and obviously we're not going to go through each

one, but there was a witness from ISDA, and that testimony starts from Mr. Brickel (ph) on page 14, and I was going to turn to page 24.

And again, what he goes through are specific problems on page 24 that the legislation in 1990 was set to remedy. And if you go through the next few pages, starting at 24, what you find is the problem that he was worried about is first, the automatic stay. In other words, there was a worry that the automatic stay would apply to terminating, and therefore, a counterparty simply wouldn’t be able to terminate these. Well, that's exactly the point. That goes to the act of terminating. What they were worried about here was allowing the counterparty to be able to take the act of terminating.

The next thing that Mr. Brickel was worried about on page 30 is very similar. And he writes, "This provision essentially assures counterparties that they will not be exposed to an effort by a bankruptcy trustee to assume agreements under Section 365 of the Bankruptcy Code."

In other words, we don't want these swaps staying out not knowing whether people can terminate or not terminate until the debtor decides whether to assume or reject them.

Those are the particular kinds of worries and concerns that are built in, and they are a recurring theme.

Another recurring theme which I won't -- which we cite in our briefs is the idea of cherry-picking. They talk about the debtor assuming some and not others. It's the same issue, though. Allowing the termination is what solves these problems. There's never a discussion about the methodology underneath them.

So, Your Honor, unless you have other questions for me, I want to turn to one last issue that doesn't relate to the safe harbor or whether or not this particular clause is an ipso facto.

THE COURT: Are we done with the legislative history component?

MR. SLACK: We are.

THE COURT: Okay.

MR. SLACK: MSHDA also has sought summary judgment on the breach of contract and unjust enrichment claims, and I'll be brief about these, but there has been no discovery in this case at all with respect to that. And as the 2nd Circuit has stated, in only the rarest cases may summary judgment be granted against a plaintiff who has not been afforded the opportunity to conduct discovery.

The parties all agree that the issue of whether this is an ipso facto and whether it's covered the safe harbor are ripe for summary and adjudication. The parties disagree about the other claims because there has been no

discovery.

Now, MSHDA says that essentially a gotcha here. What they say is that at the oral argument in the district court that my partner Harvey Miller said that the case was ripe for summary judgment. And what Mr. Miller was talking about was, the ipso facto issue that we've talked about.

The main issue before the district court on the motion to withdraw the reference was a question of whether the Court is the appropriate forum in the first instance to determine this issue. And when he said he believed the question of enforceability of the second clause of paragraph 2 of the assignment agreement to be a legal issue, all he was talking about was that clause and not the whole case.

So in any event, Your Honor, I'm not going to spend any more time on that, but I don't think that summary judgment's appropriate on those other issues. Thank you, Your Honor.

THE COURT: Thank you very much.

Mr. Goldblatt.

MR. GOLDBLATT: Good afternoon, Your Honor, Craig Goldblatt along with my colleague, Danielle Spinelli and Jennifer Jackson from the Michigan Attorney General's Office on behalf of the Michigan State Housing and Development Authority.

I agree with some, but not all of what Mr. Slack

had to say.

THE COURT: That you agree with some is a terrific start.

MR. GOLDBLATT: We'll touch on those areas.

Your Honor, we're here as Mr. Slack said, on cross-motions for summary judgment on the counterclaims that the Lehman entities have asserted against MSHDA.

The central question presented is the scope of the bankruptcy safe harbors for derivative transactions. Section 560 of the Bankruptcy Code protects the exercise of any contractual right to cause the liquidation, termination, or acceleration of a swap agreement.

That language encompasses the contractual provision that is at issue here, which addresses how to liquidate the trade, in the event of bankruptcy.

Mr. Slack's argument is that such a provision is merely ancillary to the liquidation and therefore falls outside the scope of the safe harbor.

At the outset I should say, our position is, first, consistent with the statutory language, any contractual right that directs the liquidation of a swap agreement is safe harbored, but second, even if there were such a thing as an ancillary right that might fall outside the scope of the safe harbor, the provision at issue here is essential to directing how to liquidate the trade in event

of bankruptcy, and therefore is by no means ancillary.

Now, to put this dispute in context, I think it does make sense to describe a bit about how the trade in question and how the provisions at issue came to be. And this recitation, I expect, is much like what Mr. Slack had to say.

The original transactions here were 20 interest rate swaps that MSHDA entered into with Lehman Brothers' derivatives products, LBDP. And LBDP is a triple rate A rated entity. The purpose of the swaps was to hedge MSHDA's exposure to variations and interest rates, and thereby permit it to use variable rate instruments to finance its efforts to provide affordable housing in the State of Michigan.

And as Mr. Slack described, LBDP derivatives work somewhat differently from the typical derivatives contract with which I'm sure the Court is familiar over the many years of this bankruptcy case.

As Your Honor is aware, when your typical swap agreement is terminated on account of bankruptcy, the non-defaulting party calculates the settlement amount. When the market quotation methodology is applicable, it does so essentially by determining the market price for a replacement trade.

LBDP's transactions had an unusual element, which

obligated LBDP not MSHDA upon termination to close out the trades, and for it to calculate the settlement amount, not at the market standard replacement cost of the trade, but instead at a mid-market price, which essentially as Mr. Slack described, split the difference between the bid and ask prices of the position.

Now, that provision was important to LBDP's triple A rating, that's why it's here. And the reason as Mr. Slack described, is it's because this more standard market quotation methodology would expose a dealer to the risk that if it had two offsetting trades, it would have to cover the bid ask spread.

The mid-market methodology that was in this trade, and as I understand, most LBDP, if not all LBDP trades, therefore permitted LBDP to have the triple A ratings. It didn't have this exposure to the bid ask spread that the other Lehman entities faced.

Now, LBHI's September 15th, 2008 bankruptcy was a trigger event, that would have required LBDP to close out the trade within three days. But instead of doing that, LBDP approached MSHDA, and as I understand it, several other similarly situated entities, largely public housing finance authorities that had LBDP derivatives, and proposed that the agreements be assigned out of LBDP to Lehman Brothers special financing or LBSF, which was not yet a debtor.

And as Your Honor is acutely aware, probably more than anyone, thinking back to September 15th, 2008, no one knew what the future would hold. Because LBSF, however, is not a triple A rated entity, the terms of the assignment are in many ways more like a standard ISDA documentation.

That is, it provided that in the event of non-payment for an LBSF bankruptcy, which are the most common types of default, the familiar market quotation methodology would apply.

So in response to the question that Your Honor asked of Mr. Slack, is this provision the application of market quotation commercially reasonable, is it the kind of thing that you would ordinarily, or is an attempt to single out the debtor for its treatment, the answer is no, the market quotation methodology applied is the standard LBSF forum.

It was at mid-market when it was within LBDP because there were special reasons applicable to LBDP. It was triple A rating. LBSF wasn't. Those reasons didn't apply, and so instead, in the event of bankruptcy or payment default, the market standard non-punitive market quotation methodology was applicable to determine the settlement amount in the event of one of those defaults.

Now, the agreement, to be fair, did leave in place the mid-market methodology and the -- along with all of the

requirements that LBSF, be the market who calculates it, for termination on other sort of far less common ground. Such as, for example, a merger without assumption of the agreement, and there were a handful of other types of defaults as to which the mid-market methodology would apply.

But even then, it worked just like the LBDP agreement, they had to calculate it and tell us the amounts due.

Now, the -- this happened, the assignment agreement I think significantly was entered into on September 16th, 2008. The agreement was prepared by the Lehman entities who, at the time, of course, had access to the nation's most sophisticated bankruptcy counsel.

As it turned out, LBSF did ultimately file for bankruptcy on October 3rd, 2008. And so MSHDA then closed out the agreement according to the contractual terms. It determined that the transaction was in the money to LBSF, in an amount of approximately $36 million. And in November of 2008, MSHDA sent LBSF $36 million, in accordance with the terms of the contract.

Now, just by way of context here, Your Honor, MSHDA's original claim against the Lehman entities, which is not at issue in connection with today's summary judgment proceedings, arises out of the fact that Lehman improperly demanded and obtained payment from MSHDA's bond trustee of a

$2.3 million payment for services under the agreement after MSHDA had terminated it. That's not at issue here.

What is at issue is LBSF's counterclaim back against MSHDA, and that's the claim on which the parties have filed cross motions for summary judgment, where they argue that essentially MSHDA breached the contract by adhering exactly to the terms of the agreement as it was written.

In LBSF's view, the contractual methodology that applied to the liquidation of trades in the event of bankruptcy is an invalid ipso facto clause.

Of course, if the provision of the agreement telling you how to liquidate trades in the event of bankruptcy are stricken from the agreement, the agreement just doesn't tell you how you're supposed to liquidate the positions.

The only other provisions, which are expressly inapplicable to bankruptcy terminations would have required LBSF to calculate the damages using the mid-market methodology within three days of the event of default. And LBSF, of course, didn't do that because those provisions didn't apply.

And LBSF's argument here at bottom is, you really shouldn't worry about the terms of the agreement, we should instead now rewrite the agreement to take the midmarket

methodology and to essentially, instead of having either of the parties perform the calculation, leave it to this court. And they argue that if one were to do that, we'd owe them an additional $23 million plus prejudgment interest.

Now, that position is simply incorrect.

Now, Your Honor asked where I agree with Mr. Slack, let me see if I can clear up one bit of confusion right away. The contractual provisions on which MSHDA relied is an ipso facto clause. There is no question that the basis for termination was LBSF's bankruptcy. And if this weren't the swap -- if it weren't for the safe harbor issue, you can't do that. The only basis for terminating that we asserted was the bankruptcy, and but for Section 560, a provision that says you can terminate this agreement upon bankruptcy is unenforceable against a debtor in bankruptcy. No argument from us in that regard.

The provision in substance said, in the event of bankruptcy you can terminate and here's how you calculate your damages if you do that. This is an ipso facto provision, it's all an ipso facto provision.

The point here isn't whether or not we have an ipso facto clause, we do, it's about the meaning of the safe harbors.

THE COURT: How do you read the words "to cause the liquidation" so that it embraces the methodology of

calculation?

MR. GOLDBLATT: Sure, Your Honor. So let me, if I may, take a stab at it. We highlight a slightly different collection of words than Mr. Slack, but in substance here is -- there are a couple of answers to the question, but let me try each of them.

Okay. The -- as we see the relevant language in Section 560, it's -- the provision provides -- it protects the exercise of any contractual right to cause the liquidation, termination, or acceleration of one or more swap agreement, and it continues, or to net out any termination values of payments -- of payment amounts arising under or in connection with the termination, liquidation, or acceleration of one or more swap agreements. I'm sorry, I read that very poorly, but it says, essentially, the exercise of the contractual right to cause the liquidation or to net out any termination values of payment amounts arising under or in connection with the termination, liquidation, or acceleration of one or more swap agreements shall not be stayed, avoided, or otherwise limited by operation of any provision of this title.

Now, this title, and the context of course is Title 11, and the point of this statutory language is that nothing in the Bankruptcy Code operates to stay, avoid, or otherwise limit the applicable contractual rights.

Now, the proposition that the language to cause has the meaning -- it can't possibly have the meaning that Mr. Slack ascribes to it, and there are basically two reasons.

One, it doesn't make any sense to say you can cause the liquidation without doing the liquidation. What it means to cause the liquidation, is to liquidate. That's just context and common sense. The notion that -- and indeed, Your Honor, to -- if you take that linguistic argument seriously, it says you can cause the termination, but why can't you terminate.

If you can do it, you can do it. And it would be bizarre to ascribe to Congress such an intent. And the second reason that has to be right comes from the language itself, which it goes on to say, you can set off the applicable amounts, right, that's expressly protected by the safe harbor. And so if you couldn't go about the process of liquidating it and coming to a sum certain, that second sentence that we were just describing that's in the 560 wouldn't make any sense because you need to go through the process. Just as a matter of common sense, you need to actually reduce it to a dollar figure, in order to do the netting out that is expressly safe harbored.

THE COURT: Yes, but what Mr. Slack would be saying, and I expect he will say this himself after you're

done, and I'm just going to try to channel him for a moment, what I think he would be saying is that you have the unfettered right to cause the liquidation, meaning to liquidate, but not at a penalty as prescribed by the bankruptcy clause here, but rather at the non-bankruptcy method for calculation. I think that's what he might say.

MR. GOLDBLATT: I think that's what he's saying, and I have a number of different responses to that.

First of all the premise that it's a penalty is false. It's a different number, but it's a commercially reasonable number. It's a number that's used in a lot of other contexts. It's -- there is not here an intent to single out bankruptcy for worst treatment.

So factually even if one were to read the Code that way, we still win this case.

Second, Your Honor, I guess I would submit, and I appreciate this may not be Your Honor's view is that even if this -- here's how I understand the Code.

There's a prohibition on ipso facto clauses, right, that comes through 365(e) and 541(c) and the like. And then there's the safe harbor. And the safe harbor carves -- basically says, if you're within the four walls of that safe harbor, that principle of no ipso facto, no harm the debtor, doesn't apply, just doesn't apply.

And so I would contend that if you're within the

scope of the safe harbor, if you're one of the things that falls within enumeration of the safe harbor, this background principle of bankruptcy law that says gee, you can't really disadvantage the debtor, doesn't apply.

Now, one could ask the question, is that a good way to write the Bankruptcy Code, or would there be a better way, but I guess I submit what the Bankruptcy Code we have, even a punitive liquidation provision would be enforceable, that said, there's no occasion for the Court to reach that here, because it's plain that this provision is no such thing. This is a standard commercially reasonable liquidation provision that operates the same way that many, many of LBSF's ordinary liquidation provisions operate.

THE COURT: Yes, but you're saying it doesn't apply, and I agree with what you're saying, with respect to certain specified acts.

MR. GOLDBLATT: Correct.

THE COURT: And those specified acts are to be narrowly construed, and they provide because we've been focused on the words to the liquidation termination or acceleration, in this instance, of one or more swap agreements --

MR. GOLDBLATT: Correct.

THE COURT: -- and has set off the netting that you talked about.

What Mr. Slack is saying is that the right to trigger an event is not the same as the right to run the methodology that produces a certain calculation. I believe that is the distinction.

MR. GOLDBLATT: I understand. But, Your Honor, the legislative history, not the legislative history of I'm going to scour the record and find a statement in the record that helps me, but the structure of the legislative history here I think answers that question.

Because before 2005, the statute said only the right to terminate.

THE COURT: Right.

MR. GOLDBLATT: Okay. And one -- when it only said the right to terminate you can ask the question, does that just mean you can terminate, but how you go about it, and the methodology for getting to what happens then is disputed.

Now, I would have contended then, look the right to terminate implies with it, the things that you have to do in order to terminate, close it out, figure out how much is owed, pay it.

And -- but one could have made a contrary argument from the language that didn't say liquidate it or accelerate. It just said terminate. But in 2005, the language was amended to resolve any such ambiguity, and it's

safe harbors now, not just the right to terminate, but also the right to terminate, liquidate, accelerate, and as Your Honor refers to, the exercise of any contractual right to do those things.

So I think the context of this is clear, and addresses the question Mr. Slack raises. And, Your Honor, simply as a matter of ordinary English, what it means to liquidate a swap transaction, or to liquidate any agreement is to reduce the contractual right to a specified amount that is due and owing, that's just ordinary English. Dictionary definitions confirm that ordinary understanding, and, Your Honor, unsurprisingly, the discussion of Section 560 and the Colliers Treatise (ph) and the applicable discussion in the Gutch and Klein Treatise (ph) on derivatives transactions both explain that the safe harbor protects the right to reduce the amount due under a swap agreement to a fixed sum.

Indeed, Your Honor, Lehman itself made the following argument in its summary judgment papers before this Court in the DNY Trustee case. Here's what Lehman said in DNY Trustee, "liquidation as that term is used in Section 560 of the Bankruptcy Code, specifically refers to liquidation of transactions, meaning reviewing terminated contracts and calculating amounts owed either way."

That is exactly right, and that is exactly what

MSHDA here. The heart of Mr. Slack's argument, as I understand it, is that while the safe harbor protects the right to liquidate, this is different because here we've somehow changed the liquidation formula on account of bankruptcy. And that that change is an ancillary provision that falls outside the scope of the safe harbor. That's at bottom I think what he's saying, but that's wrong with respect on a number of levels.

In substance, Your Honor, this agreement provides one methodology that's applicable for bankruptcy and failure to pay, and another methodology that's applicable for other events of default.

The liquidation methodology is therefore part and parcel of the right to terminate on account of bankruptcy, to impose a methodology that would apply to bankruptcy defaults that is different from the one the parties specified, would be simply to rewrite the agreement. This isn't something that one can just strike and otherwise give effect to the intent of the parties.

And for that reason, the provision is really wholly unlike the procedural mechanism that was found to be ancillary in Calpine, the case that Mr. Slack was describing, and the only case to draw the distinction on which Lehman here relies.

Your Honor, as Collier's explains when it's

discussing Calpine, the safe harbor permits the non-defaulting party to engage in self-help. Essentially, the non-defaulting party can take action itself to terminate the agreement.

Now, what's different is that in Calpine, the agreement also imposed on the debtor the requirement to sort of jump through the procedural hoops that Mr. Slack was describing. And what Calpine says is that when an agreement does that, imposes upon the debtor an obligation to take particular procedural steps, that those provisions might be set aside as ancillary and default outside the scope of the safe harbor, but whether that is right or wrong.

What we are talking about here, are the core fundamental provisions that tell you how to liquidate the position.

So the proposition that these provisions are ancillary and fall outside the scope of the safe harbor is really just incomprehensible in the context of this agreement.

And nor, Your Honor, on reflection do I believe that this Court's opinion in BNY helps Lehman's position, at least as I have come to understand the critical passage of that decision that's at issue here.

Okay. Here's what this Court wrote, "Because the sections of 560 deal expressly with liquidation, termination

or acceleration (not the alteration of rights as they then exist), and refer specifically to swap agreements, it follows that the noteholder priority provisions and condition 44 do not fall under the protection set forth therein."

Now, if that passage means as Mr. Slack argues, that anything that alters a party's rights on account of bankruptcy falls outside the safe harbor, then he's right, the passage supports their position. But on reflection, that cannot be what that passage means since that reading would essentially read the safe harbor out of the Bankruptcy Code entirely.

And on the facts of BNY Trustee, the flip clause provision importantly applied only after the swap agreement had been fully liquidated. And if what this Court was saying then, look once the swap has been fully terminated and liquidated, a flip clause that exists in a wholly separate agreement, one that would reverse the order of priority of payment of the proceeds of that already fully liquidated swap is not protected by the safe harbor, then that position has no application at all to this case.

And on that view, which I now believe must be what the passage in question in BNY is holding, the decision does nothing to support Lehman's position.

Finally, Your Honor, the implications of a holding

that the safe harbor does not apply here must not be understated. I think Your Honor got at some of these points in your questions to Mr. Slack.

ISDA itself filed an amicus brief in this case, and as ISDA explained in that brief, the provisions of the agreement that are at issue here are mercurially the same as the provisions of the ISDA master agreement.

It specifies that bankruptcy is an event of default, and it provides a methodology for liquidating the trade when bankruptcy is the event of default.

Other methodologies may apply to other termination events. If we cannot apply our agreement as its written, then the bankruptcy termination and liquidation provisions of the ISDA master itself, constitute invalid ipso facto clauses. And ISDA's own amicus brief in this case says exactly that.

And, you know, what everyone thinks about the use of various snippets of legislative history, in the statutory case that is at bottom about devising what Congress intended to do, the proposition that the safe harbor provisions would not permit the bankruptcy termination or liquidation provisions of the ISDA master to operate as they are written is really simply a bridge too far.

The legislative history of the safe harbor provisions is replete with comments making clear that their

central purpose was to allow one simply and swiftly to close out a swap position in the event of a counterparty's bankruptcy.

I think -- I'm sure I didn't write down what Your Honor said perfectly, but what I believe Your Honor said was something like in a question to Mr. Slack, one could argue that strictly enforcing a contract as it is written is important to the stability of the markets. That is exactly our argument. The point of the safe harbors is to say, you can actually enforce the agreement as it's written.

The conclusion that this agreement is by its terms unenforceable, and therefore, we have to essentially have some reformation process to figure out, well, if we strike this provision, what's left of the agreement, how do we make sense of it, you know, apparently they said the mid-market calculation applies, but the provision of the contract that required them to calculate doesn't apply, so how does this work, we have to redo the deal. Here we are now five years after the bankruptcy, that is the very instability, confusion, delay that at bottom whatever you think about the details and the scopes of the safe harbor's at bottom the type of disruption that they were trying to avoid.

At bottom, Your Honor, I return to a question that you asked of Mr. Slack, where you said to -- what does it mean to cause the liquidation other than to do in accordance

with the agreement. I don't think Mr. Slack answered that question, because I don't think there is an answer to that question. What it means to cause the liquidation, to protect contractual rights to cause the liquidation of an agreement, is to say you can apply the contractual terms that tell you how to liquidate the agreement. And that at bottom is what's safe harbored.

So for these reasons, maybe one other sort of housekeeping point, there is no intention here to play a game of gotcha. We -- our view in terms of what's at issue before the Court fundamentally the most central issue is this question of statutory construction.

And I don't think we're here to quibble with once that's resolved, I'm hopeful -- I mean, in fairness, I know Your Honor has admonished the parties a number of times to try to work out their differences, and the fundamental --

THE COURT: That's what I do in every case.

MR. GOLDBLATT: I understand. You did so here with particular force and clarity. And I guess what I mean to say is I think the central point that divided the parties is this, as Your Honor puts it, difficult and subtle question about the meaning of the Code. And I think with that resolved, I'm hopeful that we'd be able to continue discussions and work through it, so I don't want to stand on ceremony or on procedure or play gotcha, that's the

fundamental issue before the Court, and that's the one at bottom that we are asking the Court to resolve.

You know, for those reasons, Your Honor, MSHDA respectfully submits that it is entitled to summary judgment on Lehman's counterclaims, and that Lehman's corresponding motion for summary judgment on those claims should be denied.

THE COURT: Thank you very much.

MR. GOLDBLATT: Thank you, Your Honor.

THE COURT: Mr. Slack, do you have more?

MR. SLACK: Thank you.

THE COURT: Before you start, I'm going to make this one comment, because I know we have some other matters that are on for the afternoon. I think this may be the heaviest afternoon I've had since the start of sequestration. And in the rules of the Court as they have been modified to deal with the fact that personnel are sent home at 5 o'clock now, and being able to stay late as we did five years ago, in order to accommodate an emergency, seems no longer to be feasible.

We need to close at 5 o'clock, more or less wherever we are in this process, so those who are at the back end of the calendar, I don't know how long this is all going to be, may have to come back another day. And I apologize for that in advance. Hopefully we'll get through

it.

Now, Mr. Slack.

MR. SLACK: Your Honor, I'm going to try to be relatively brief.

I want to start with the ISDA brief that was filed here. It's not clear to me what the status of that is because I think the motion that they made for an amicus was not properly made and they're not here. But I do think there's two points to make to the extent, Your Honor, that you consider that brief.

The first is, that the ISDA amicus brief says something which I think is important. That brief says, quote, contrary to Lehman's suggestion, no one is arguing that the early termination, calculation methodology provision in this swap agreement is not an ipso facto provision.

So at least with respect to the first issue, ISDA is very clear that they agree with us, that it is an ipso facto. The question is whether it's safe harbor and obviously they have their view on the safe harbor.

THE COURT: Mr. Goldblatt in his argument pretty much said the same thing.

MR. SLACK: The second issue with respect to the ISDA brief, and I point this out, because I think it's -- it shows the inconsistency in the interpretation of the safe

harbor here, and in the Enron case, and in the Calpine case.

ISDA has filed a brief in the NY case in the district court, and Mr. Goldblatt was the counsel on that brief. So when ISDA filed this amicus brief, they went out and hired different counsel. They hired Cadwalader.

Now, Cadwalader, interestingly enough and Mr. Allenberg who filed that brief on behalf of ISDA, they were -- Mr. Allenberg and Cadwalader were counsel for Enron in the Enron case that we've been citing.

And when you look at the Enron brief that Mr. Allenberg filed on behalf of Enron in that case, and I'd like to hand it up to the Court. May I approach, Your Honor?

THE COURT: Sure.

MR. SLACK: And I invite the Court obviously given the time to read, you know, the entire brief, which I think is helpful but I'm going to turn -- if you turn to page 8, and the argument that's being made by Enron and Mr. Allenberg in this brief, the interpretation, when you're talking about, and I'm looking at the last sentence of paragraph 20 and to 21, and I'm going to read.

It says, "The term contractual right as defined in Section 560 of the Bankruptcy Code pertains only to the right to terminate a swap agreement, and permit such termination under common law, in the absence of an expressed

contractual right."

Paragraph 21 continues, "A cursory review of the swap agreement definitively demonstrates that MARDA (ph) indeed has a contractual right to terminate the agreement, which it, in fact, exercised pursuant to December 2001 termination letter. ENA (ph) does not contest the validity of this termination. It is the act of termination that Section 560 allows."

And, of course, that's exactly our argument today, Your Honor, and it's no different than was made in the Enron case and made in the Calpine case. It is the act of termination, the act of liquidation, and the act of acceleration, and not any ancillary rights, not any methodology or how to, but simply the act, which is safe harbor.

THE COURT: Okay. I understand the argument you're making. It's with respect to an earlier version of 560 that didn't include the term liquidation, and you're saying, if you read this brief written on behalf of a client by a lawyer 11 years ago, who was also counsel for ISDA on the brief that you've referenced in the current case, we're a lot of steps removed from what we're talking about here, but I'll grant you this.

Assuming that the same lawyers' advocacy from 11 years ago were to be applied to Section 560 as it currently

exists, and he would adopt the same language that it means the act of liquidation, the very same issue that we've been debating this afternoon exists, how can you have an active liquidation that doesn't respect the contractual terms that provide for the liquidation?

MR. SLACK: Well, again, when you say provide for the liquidation, or provide for the termination, I think the missing part is, there's nothing in this case, there's no provision that is preventing MSHDA or any party to terminate, liquidate or calculate.

THE COURT: But if you have the unfettered right to liquidate, how do you do it unless you follow the contract that provides for the liquidation right?

MR. SLACK: You do it the same way you would do any other. What you do is you look and see if there's an ipso facto clause you don't apply it. Because the --

THE COURT: Everybody admits, everybody is admitting now this is an ipso facto clause.

MR. SLACK: Right.

THE COURT: We're now limiting -- this is getting very concentrated. All of these arguments are now funneling into some words in Section 560 as it presently exists, and we're interpreting those words, that's the exception that is swallowing the rule, at least in this instance.

Because -- and we'll -- first of all, you continue

with your argument, and this is something I'm not going to decide from the bench today, I'm going to think about it, and write on it, it's an important issue, but because we're talking about Mr. Allenberg, I'm going to make an observation which is in the nature of a statement that I might have made at the outset, but I didn't realize it was going to become an issue in this oral argument.

I am currently co-chair of an advisory committee to the commission appointed by the ABI dealing with the reform of the Bankruptcy Code. My advisory committee is the advisory committee on the safe harbors. Mr. Allenberg is a member of that committee.

There are other members of the committee that include Harvard law professor, University of Chicago law professor, professionals who are involved in this field at major law firms. And so I am involved at this moment and have been for the last approximately year in a thoughtful, absolutely confidential analysis of the safe harbors as they presently exist, and as they might constructively be modified.

None of what we are doing affects this question, and I wanted to be very clear in making the statement, that there is nothing that has happened in the advisory committee that deals specifically with the issue which is before the Court today, and none of that private discussion will

influence the outcome of this hearing. And you've given me an opportunity to make that speech.

And I will not allow Mr. Allenberg to lobby me.

MR. SLACK: Your Honor, I want to get back to the question you asked, which is, how would a party go about, you know, with its expectation of the parties with respect to this clause if you can't apply the methodology that's in the contract. And I would posit to Your Honor that it's no different than any other ipso facto question. Let me explain.

With respect to 2(a)(3), 2(a)(3) is in the contract. It is a provision that's there, people can read it. And when you're talking about how would a party go about dealing with its rights under an ISDA when the language says that you can stop paying even if there's a bankruptcy. Well, the answer is, is where there's an ipso facto, the parties have to adjust their conduct according to an ipso facto clause.

And so here, Your Honor, I would suggest that there's absolutely nothing that prevents the parties from calculating. The issue is whether you use one methodology or another methodology. Either way, there's going to be a calculation. And the parties are going to reach the end, and I would suggest that what the parties need to do, the same way as the parties who might be the trustees looking at

a change in priority clause, or counterparties looking at 2(a)(3), is they have to understand that where there's an ipso facto clause, you don't apply the ipso facto methodology. But you can calculate.

And so that's what I say, Your Honor, should happen here. A couple of other points.

With respect to the Calpine case, I think because it's a very difficult case for MSHDA, what Mr. Goldblatt says is that in that case there was some kind of an imposition on the debtor, and therefore, the imposition on the debtor wasn't safe harbored, but if there was no imposition on the debtor it might have been.

I would suggest, Your Honor, that there is absolutely nothing in the safe harbor that makes that distinction, nor is there anything in Calpine that makes that distinction. The fact is, is that you had a clause in that case which was part of the process for breaching a number, and the party argued theoretically without being able to comply with that two day period, they were not able to reach a number to net out and liquidate or, you know, their position.

I would say that is no different than the situation here. And so, Your Honor, the distinction that they make in Calpine simply wasn't made by the case. It doesn't make any sense under the safe harbor.

Another point that Mr. Goldblatt made was, as I predicted, he said while the methodology here is one methodology for a couple of different events of default, and earlier in his argument, he suggested that the most common elements of default had a market quotation, and the less common had mid-market.

Now, first off, there's nothing in the record that suggests that. As Your Honor probably is aware, the ISDA has eight separate triggers for events of default, two of which were accepted here.

There's nothing about them being more common or less common than any others, and had the intention here been, well, LBDP needed this mid-market, but it's gone, so let's just not have a mid-market. The parties could've agreed not to have a mid-market at all, they had one methodology. But that's not what they did. They said, here's the general rule, we're going to have two exceptions from that general rule.

And again, it is, and I think now what I'm hearing is, both ISDA and MSHDA are agreeing that that is, in fact, an ipso facto clause.

THE COURT: Is it your position, Mr. Slack, that it is impermissible for an ISDA form to prescribe a safe harbored method of calculation to liquidate collateral in situations of this sort?

MR. SLACK: I believe that if you had a provision that liquid -- that was in the ISDA that had a methodology for liquidating collateral, it wouldn't need to be safe harbored. So the safe harbor wouldn't come into issue.

The only time you -- this comes into issue is when you have a change in the methodology. And what I can tell you is if you look at the credit support annex, the credit support annex simply says, you know, that you can liquidate collateral. And there is no methodology for liquidating the collateral, because the idea is, you can't liquidate. So there is no methodology there.

And that's really important because ISDA isn't concerned with, and the safe harbor certainly aren't, with the method. The issue here is whether you can liquidate, which is safe harbor. And so I would say to you, there's nothing, there's nothing that you have to safe harbor if you had a methodology.

THE COURT: Okay. Well, let's just say that there's a toggle switch, and if there's no bankruptcy, it'd mid-market, and if there is a bankruptcy, it's market quotation. And it says in plain English, in the event of bankruptcy, market quotation methodology will apply, and that is fully consistent with the safe harbor provision of Section 560. Let's just say it said that.

MR. SLACK: I would say that you reading the plain

words of 365(b)(1), you can't change a debtor's rights based on the bankruptcy. And --

THE COURT: But are we really changing the debtor's rights if what we're talking about is a market based commercially reasonable means to convert assets to cash and reconcile balances?

MR. SLACK: I guess I would tell you this, Your Honor. When you have a clause that, in fact, changes the rights, I mean, we can -- you can look at it in the abstract, but the truth is, is that this clause in fact changed the rights, and there's no dispute about it, of the debtor in this case.

And hypothetically we can all talk about why parties might want to have clauses like this. There's certainly nothing in the record that suggested what's going on here is the parties had a rationale reason other than a change in the rights of the debtor in making these kinds of provisions. The same way, frankly again, you know, you had in 2(a)(3), you had a concept of a number of different events of default, and you had a clause that changed the rights of the debtor as a result of it.

It's the same thing here. The rights are definitely being changed. And if you look at what happened here, you had $20 million that's been taken out of the debtor's pockets because the methodology changed here. So,

in fact, there was a change in the debtor's rights. And I think that's what the safe harbor, and I should say the ipso facto provision, 365(b)(1) deals with.

THE COURT: Okay.

MR. SLACK: Thank you, Your Honor.

THE COURT: Thank you. Mr. Goldblatt, do you have anything more?

MR. GOLDBLATT: Very brief, Your Honor. I mean, at bottom, we appreciate all of the Court's time, and don't want to take up more of it than necessary. We think it's a straight forward case. The safe harbor protects the contractual right to liquidate or terminate so that's what happened.

THE COURT: All right.

MR. GOLDBLATT: Let me --

THE COURT: If it's a straight forward case, we've taken all afternoon discussing it.

MR. GOLDBLATT: If I can just pose one scenario that I think exposes the illogic with respect of Mr. Slack's position.

You could imagine an agreement that said, because his whole argument depends on the notion that this agreement as constructed, was designed so that the debtor was worse off in the event of bankruptcy. His whole argument turns on that.

We don't dispute that as things turned out, the bankruptcy termination provision, as it turned out after the fact, had language that would leave us better off. Imagine you had an agreement that said, there are three different events with three different methodologies. And one was event A, one was bankruptcy, and one was event C. And the contract said, D applies in bankruptcy, that turned out to be the middle scenario. Would you say there, but it was worse than one, but better than another? Would that change the debtor's rights on account of the bankruptcy?

That's sort of our question, change compared to what? That doesn't mean it's not an ipso facto clause, it's all triggered by bankruptcy, so it's ipso facto. But the notion that there's some baseline here, which is your baseline rights, and the bankruptcy termination provision changed them to make them worse just doesn't make sense in this context.

Here, there was a provision that applied in bankruptcy. There was another provision that was different. There was never a change to the bankruptcy provision, that's the one that was specified. And in order to make what is otherwise a complicated matter simple, the thing to do is to say, as I think the statutory language provides, where there's a contractual provision, even if it's an ipso facto clause that says, here's what happens in the event of

bankruptcy with respect to how you liquidate or terminate the provision, you can apply that agreement as its written. That's a simple plain language approach to the statute that avoids the market uncertainty, and I think is the outcome of the statute and the law requires.

I appreciate the Court's time.

THE COURT: Thank you very much.

MR. SLACK: May I take 30 seconds and respond to this?

THE COURT: You can take 30 seconds.

MR. SLACK: That's all I'm going to take.

THE COURT: I don't have a second hand on my watch, I'm just going to do what feels right. So when it feels like 30 seconds have run, you're done.

MR. SLACK: No, not yet.

Your Honor, the argument that was just made goes to whether it's an ipso facto, and there was the comment, well, it is an ipso facto. Well, if it is an ipso facto, the only issue is whether it's safe harbored, and none of the issues that Mr. Goldblatt just raised go to the safe harbor point. They only go to whether there was a change, and i.e., whether it's an ipso facto.

So I think there's -- I thought I heard a concession both from ISDA and MSHDA originally, and now I think they're trying to say that it is an ipso facto.

THE COURT: No, I -- without extending this any longer, these are my 30 seconds now, you can sit down, Mr. Slack.

I think I've understood everybody's argument, and I think it is as I stated at the outset, a subtle issue that requires thoughtful attention, and I appreciate the very effective briefing and oral argument this afternoon. And I'll decide this in due course, thank you.

MR. SLACK: Thank you, Your Honor.

MR. GOLDBLATT: Thank you, Your Honor.

THE COURT: If anybody wishes to leave at this point, that's fine.

UNIDENTIFIED: Thank you, Your Honor.

(Pause)

MR. WIN: Good afternoon, Your Honor, Zaw Win, Weil Gotshal & Manges for Lehman Brothers Holdings, Inc.

The next matter on the agenda is in the adversary proceeding, Lehman Brothers Holdings, Inc. versus Intel Corp. It's adversary Case No. 13-1340, and I'll turn the podium over to the parties that are handling that matter.

THE COURT: Thank you.

Oh, you're back for this one?

MR. GOLDBLATT: Fortunately Mr. Buckley has the lead, Your Honor.

MR. BUCKLEY: Good afternoon, Your Honor, I'm John

Buckley from Williams & Connolly on behalf of Intel Corporation.

We're here on our motion to ask for a determination from the Court that Count I of the complaint, which is a breach of contract count is non-core, and to dismiss Count II, the turnover count, and Count III, the automatic stay violation count for failure to state a claim.

I'd like to go over some of the chronology of the case. We think it's very important, particularly important in addressing the issues with regard to the turnover and automatic stay.

THE COURT: I'm happy to have you do that, but you should assume for these purposes that I've read the papers, and I have a fairly clear recollection of what I expect you're about to say.

MR. BUCKLEY: Okay. Thank you.

So this case arises out of a corporate share and purchase program, in which the issuer Intel would buy back its own shares, and such corporations, of course, when they're in possession of material non-public information can't do that directly, so we would indirectly in accordance with the provisions of the securities laws.

And it was in that situation that in August 2008, Intel turned to Lehman Brothers of DC derivatives, also known as LOTC or LOTC to accomplish the repurchase of its

shares. And the fundamental provisions in the agreement were as follows. That first on August 29th, 2008, Intel would pay $1 billion to LOTC to LOTC, and on the same date, in return, LOTC would pay $1 billion cash collateral to Intel for Intel to hold.

THE COURT: Can I ask you one question about this because --

MR. BUCKLEY: Yes.

THE COURT: -- this actually puzzled me as I was looking at this. Was there actually a wire transfer --

MR. BUCKLEY: Yes.

THE COURT: -- in which a billion dollars went one way and a billion dollars went another way --

MR. BUCKLEY: Yes.

THE COURT: -- or did people just say, okay, you have a billion, we have a billion, let's just say that your billion is my billion, and your billion is my billion?

MR. BUCKLEY: No, I think the form was observed. I think that in terms of the agreement, the billion dollars due from LOTC to Intel is not payable until Intel had paid the billion dollars to LOTC. So I think that formally, yes, there were two transfers of funds at that time.

THE COURT: So there is no doubt that LOTC funds were being held by your client.

MR. BUCKLEY: Yes.

THE COURT: Okay. That's a very helpful acknowledgement.

MR. BUCKLEY: Okay. Thank you.

THE COURT: For the debtor.

MR. BUCKLEY: Well, I think not, but I'll get to that in a minute.

THE COURT: Well, I'll tell you why I think it is later.

MR. BUCKLEY: Okay. Good.

Then in terms of how the (indiscernible) was to unfold, then on -- after this exchange was made on August 29th, then the next important event was to be September 26th, when LOTC was to deliver a combination of shares and possibly cash to Intel, based on a formula that was routed in the average volume or the volume weighted average price of Intel stock during that 21-day calculation period that ended on September 26th.

And at that time, based on what's called the VWAP formula, LOTC was to deliver cash -- I'm sorry, shares and again, possibly cash.

Now, what in fact happened, was of course, there was on August the 29th the exchange of funds, and then further on September 15th, Lehman Brothers Holdings, Inc. filed for bankruptcy at that time. However, LOTC did not file for bankruptcy, instead as the complaint alleges, they

continued to perform under the contract, and continued to acquire shares for eventual delivery to Intel.

Next event was September 26th, which was the end of the calculation period. And at that time, Intel sent a letter to LOTC advising that based on Intel's own calculation of what the VWAP had been during the calculation period, Intel was owed approximately 50.5 million shares by LOTC, which were due the next business day, which was September 29th by the close of business that day by 4:30 p.m.

At the same time that letter, again sent on September 26th, Intel noted that there had been an event of default on September 15th, when LBHI which was the credit support provider for LOTC under the credit support annex had filed for bankruptcy, but Intel said it reserved its rights in that regard.

On September 29th, which was the delivery date, no shares were delivered, and of course, no cash was paid as well. So after 4:30 p.m. that day, Intel wrote a letter to LOTC saying that, in light of the event of default which had occurred September 15th and was still occurring, and in light of the failure to deliver any shares or cash that day, Intel was declaring an early termination date under the agreement.

Intel went on to calculate its loss, because the

agreement provided for second method and loss, not market quotation, meaning that Intel was entitled, reasonably in good faith, to determine the amount of its loss. And Intel did that calculation, and concluded that its loss was $1 billion, which among other things, was the value of the shares that would have been -- that should have been delivered on September 29th, as measured by the agreed price in the contract, which was the VWAP price. That is to say a billion dollars applied against the VWAP price over the 21-day calculation period would have resulted in a billion dollars and 50.5 million shares.

So the loss in dollar terms was a billion dollars plus the interest had accrued from the time of the inception of the transaction.

That amount then because there had been a declaration of an early termination date was then due and payable from LOTC to Intel. It was not paid.

So the next day, September 30th, Tuesday, Intel again wrote to LOTC informing that in light of the failure by LOTC to make any payment, Intel had that day, set off against its losses which again it had calculated previously in its letter of the 29th against the posted collateral, and applied it in full. So that the loss was a billion dollars plus interest, and the collateral was a billion dollars plus the interest that had accrued, so they equaled each other.

So at that time, the collateral -- I'm sorry, the claim that Intel had was set off fully against the collateral, and the collateral was taken in and applied by Intel at that time, so the collateral did not exist after September 29th.

On October 3rd, that's when LOTC filed its petition for bankruptcy. So that's the basic sequence of events.

Let me turn to the first ground or -- for dismissal.

THE COURT: Before you do that, can you explain to me how your client came up with a damage calculation that managed to exhaust the entire billion dollars, given the fact that it's my understanding that the value of approximately 50.5 million shares under the VWAP approach was something materially less than a billion dollars.

MR. BUCKLEY: I think Your Honor is mistaken in that regard, and let me explain.

THE COURT: That's why I'm asking you the question.

MR. BUCKLEY: Okay.

THE COURT: This is your opportunity to --

MR. BUCKLEY: Okay.

THE COURT: -- make your first best impression.

MR. BUCKLEY: Thank you. The reason is as

follows, so several reasons are the contract, why the proper amount was a billion dollars. But let me begin by pointing out that the contract provided by second method and loss, not for market quotation approach.

So that Intel was entitled to determine its loss, as long as it did so reasonably and in good faith. And there were several provisions in the contract that indicated that the appropriate amount of loss was $1 billion.

The first provision was the exposure provision in the contract, which said that Intel's exposure during the course of the contract would be a billion dollars. It was a fixed amount. But as -- it would not fluctuate with the market value of Intel stock, it would not fluctuate with the number of shares that LOTC happened to acquire over the course of its performance, instead it was fixed and constant throughout.

And as we've explained in our submission, the exposure amount represents the amount that would be payable, in the event of a default under the ISDA master agreement, and the context where it was a no fault default, if I can use that terminology.

So a billion dollars was Intel's exposure throughout, and the amount that it expected to be paid if there were complete default on the agreement; that's one provision.

The next provision pertains to the so-called agreed value of the shares, that is, in the event of a default, the contract provided that the shares that were to be delivered were to be valued according to what was called, this is in quotation marks, the agreed value, which was the VWAP price, so that whatever shares were to be delivered, they were not to be valued at market, what the stock market was on delivery date, but rather to the contract price, the agreed VWAP price.

So applying that formula, and again, we haven't briefed this in detail, because it didn't seem appropriate at this stage to do so, but applying that approach under the agreement, leads to the conclusion that if you applied the agreed price, the result is a billion dollars, and we've done the calculation in our brief, and we've also contemporaneously at the time, when Intel sent its notice of an early termination date in calculating its loss, it did the calculation as part of the complaints, and attachment to the complaint as well.

So $50.5 million times the VWAP price, which was approximately $19 a share equals $1 billion. So that was the contractually specified means of determining what the value was of the (indiscernible) at that time.

Further, there's a provision in the default remedies section of the contract that states that -- it

might be useful for me to actually quote from this, that Intel has no obligation to return the posted collateral unless and until the promised shares are delivered, that is the requisite number of shares are delivered to Intel, Intel has a right to hold on to the collateral.

If you take a broader view, going back to the contractual provisions themselves, this was a situation in which Intel paid a billion dollars for a performance, that is the acquisition of shares in the marketplace, and most importantly, the delivery of those shares upon the maturation of the contract.

Intel paid a billion dollars and got nothing in return. So it's a situation where there's been a fundamental breach of the contract as well. It paid a billion dollars for shares that were to be priced according to the VWAP formula, it got nothing in return.

So on that analysis as well, a billion dollars Intel believed was the appropriate amount. There are other provisions of the contract they relied upon as well, but we didn't brief them for you, at the appropriate time can point them out. But those are not the only sections of the contract for which we rely. So we think that just in terms of reasonableness and good faith. This was a reasonable approach and at the appropriate time be able to justify the actual calculation.

But in terms of helping the Court, if I can to understand what the reasoning was behind it, that was the reason.

THE COURT: All right. Thank you.

MR. BUCKLEY: Okay. So let me turn to, for the first question is, which is whether the breach of contract claim was a core claim or not. And I would point out to you that it is not disputed that there was -- that's a default, not disputed that there was a failure to deliver any shares or return any of the cash. Not disputed that Intel had a right to determine its loss reasonably in good faith, and it's not disputed that Intel had a right to set off its loss so determine against the collateral, and not disputed that it did so in full.

The debate here, if you will, is that the plaintiffs contend that Intel did not correctly calculate the amount of the loss, it overstated a loss in its view, and that it took too much of the collateral, that's the debate. And they claim that that is a breach of contract.

So the first question we have is, is this a core claim, or is it a non-core claim. Statutorily and constitutionally I would submit it's a non-core claim. First looking at the statute, Section 157 there are three types of jurisdiction. There is --

THE COURT: Can I --

MR. BUCKLEY: -- arising under -- I know this is very familiar territory with you.

THE COURT: Can I just break in?

MR. BUCKLEY: Sure.

THE COURT: One way to look at what you're seeking to do here is to oust bankruptcy court jurisdiction and that while this is a technical argument about core/non-core on your first count, and an argument on dismissal of the bankruptcy counts, turn over property and stay violation, if you get what you're seeking as a preliminary matter, what you really get is an opportunity to find a new tribunal. Isn't that what you're seeking?

MR. BUCKLEY: Well --

THE COURT: Otherwise, why would you be doing this right now?

MR. BUCKLEY: For a number of reasons.

THE COURT: This is forum shopping, isn't it?

MR. BUCKLEY: No, it's not.

THE COURT: Well, I knew you'd say that, but isn't it forum shopping?

MR. BUCKLEY: No, I think it's -- the statute invites the motion at the outset because I think the party has a right to determine and to learn what the role of the Court is going to be, and it varies whether it's core or non-core. If it's a core determination, then Your Honor has

the ability to enter a final judgment on these matters. Non-core --

THE COURT: I understand the jurisprudence, and I certainly know Mr. Goldblatt knows the jurisprudence in this area quite well, but the real question here is for me, regardless of the disposition of your motion as to core/non-core and the timing of the disposition, would you consent to have this court deal with a non-core Count I, or are you in fact, seeking to move this entire dispute elsewhere?

MR. BUCKLEY: That is a decision to be made by the client, and the client hasn't taken a decision on that right now. So what we're trying to do is to clarify what is the basis for the Court's jurisdiction. We don't contest relating to jurisdiction, and all we're seeking to determine is, that is the nature of the jurisdiction, that it's non-core (indiscernible) jurisdiction.

And I said, I think the statute -- as I said at the outset, it brings clarity to the proceeding, and we're trying as well with respect to our motion aimed at turnover and automatic stay violation, to clarify that this is claims not arised (sic) under the Bankruptcy Code, which will have, you know, will have consequences in terms of what the relief and remedy and what the procedure is.

So in order to sort of define what the case is about, what the nature of the jurisdiction is, what is the

claim, under what is it proceeding, what is the relief that's available to the plaintiffs, this is the appropriate motion just to bring clarity to the situation. It does not sail to the Court that it's the -- it's Intel's intention if the Court were to grant these motions to move this matter to a different court. I apologize if somehow that impression is being created, but that's not a determination, that's not --

THE COURT: Well, it wasn't an impression created as much as an inference drawn.

MR. BUCKLEY: Okay. But I can just say that the client has not made any decision on that, and this is not a forum shopping. We're not trying to oust the Court, we agree the Court has (indiscernible) jurisdiction. We have no problem in that, and there are many reasons why the case may well remain here with the Court, even if it's only relay (ph) in two jurisdictions. So I don't want to prejudge what the decision will be, if any on that regard, but I think there are other reasons to bring this motion now at this time, in order to learn where we are jurisdictionally and where we are in terms of the claims.

THE COURT: I'll try to provide that guidance promptly.

MR. BUCKLEY: Appreciate it.

THE COURT: But let's get into the merits of the

argument.

MR. BUCKLEY: Okay. So with respect to the -- the question was core/non-core, clearly this is not a claim brought under the Bankruptcy Code, it's brought under a contract, and therefore under the state law.

The next, is there a rising under jurisdiction here, and I think clearly there is not. The test for that was spelled out in the 5th Circuit's decision in Wood versus Wood, an opinion that's widely cited by Judge Wisdom, that arising in jurisdiction pertains to only those administrative matters which could occur, only in a bankruptcy case.

And, Your Honor, in your decision on the extended stay case said the same that if the claim could arise outside of bankruptcy, then it doesn't qualify for a rising in jurisdiction.

This claim here clearly could arise outside of bankruptcy. It's simply a breach of contract claim, and therefore, I think statutorily, it's plainly a non-core case.

Now, what is the argument that they make for saying that it is a court case, mainly because the event of default was the bankruptcy of LBHI, but that I will submit is irrelevant.

First, this claim did not arise in the bankruptcy

of the counterparty to this contract, LOTC, in fact, all of the events occurred well before LOTC filed for bankruptcy on October 3rd. Every event leading to the claim for breach of contract, both the declaration of an early determination date, and the announcement that Intel was setting off the collateral and applying the collateral. All that occurred on the 29th and 30th of September, well before LOTC's bankruptcy, so --

THE COURT: I wouldn't call that well before.

MR. BUCKLEY: Several days before, but enough before.

THE COURT: Four days before.

MR. BUCKLEY: Right. So it's a prepetition claim that is when that matured prepetition, and matured in full before LOTC's bankruptcy.

Let me turn to LBHI's bankruptcy. LBHI was not a party to the contract. Its relevance here, if any, is merely as the referenced entity in the credit support agreement. And it's pretty clear, I would submit in other cases, particularly including his Honor's decision in extended stay, that merely because the triggering event for an obligation happens to be the bankruptcy of a debtor, that does not make it a core proceeding.

An extended stay, you may recall, there was a guarantee at issue there. The guarantee was triggered by

the bankruptcy of the debtor, and therefore, there was an argument put forward that a claim on the guarantee had to be a core bankruptcy proceeding, and Your Honor rejected that, saying it was irrelevant that the bankruptcy of the debtor had triggered the liability under the guarantee.

And if the rule were otherwise then, for example, every bankruptcy filing by referenced entity under default swap agreements gives rise to the argument that a contract dispute between parties to the contract was -- it was a core matter in bankruptcy court. And I think bankruptcy courts have been very vigilant in warning against allowing parties inventively to expand the scope of bankruptcy court jurisdiction by dressing up what are common law claims or what are breach of contract claims, to making them appear as if they're a claim under the Bankruptcy Code, or that they're arising into jurisdiction.

So I think that that -- the relevance of the fact that the triggering event was the bankruptcy of LBHI doesn't change anything.

Turning to the constitutional issue, I think under Stern v Marshall the rule is now absolutely certain, that is, unless -- that is in cases like here, where the claim is based on a private right, it's not a claim that can be determined by a non-Article 3 court. And a breach of contract claim is squarely a claim based on a private right,

so both statutorily and constitutionally, this is a non-core claim, and we have to ask Your Honor to so determine that the only jurisdiction here is the relating to jurisdiction.

If I can now turn to the Count II, which is the turnover count. And the claim here is that Intel is in possession of property of the estate, which should be turned over.

THE COURT: Well, let me stop you for a second, and harken back to that little question and answer we had right at the beginning of the argument, in which you clarified that as this transaction was handled from a mechanical perspective, LOTC cash migrated into --

MR. BUCKLEY: Right.

THE COURT: -- the possession of Intel.

MR. BUCKLEY: Uh-huh.

THE COURT: And let's assume for the sake of this discussion only, you don't have to accept the truth of the proposition otherwise --

MR. BUCKLEY: Uh-huh.

THE COURT: -- that the grab of Intel with respect to the fund although based on what you assert was a reasonable and good faith determination, in fact is, just to pick a number $127 million off.

MR. BUCKLEY: Uh-huh.

THE COURT: And that, in fact, you seized debtor

property that may be 127 or 300 something million dollars, depending on calculations that I've read in the debtor's papers. Aren't you, in that instance, wrongfully holding, if they're right, aren't you wrongfully holding debtor property, and aren't you, as a result, subject to a turnover?

MR. BUCKLEY: No.

THE COURT: Why?

MR. BUCKLEY: For the following reasons. First, as I've indicated, the contract allows for a set off, that is in the event of default, Intel was entitled to calculate its loss, and then to apply the posted collateral to that loss, which had been so fully here.

If Intel miscalculated its loss, or if it set off too much of the collateral, that would give rise to a breach of contract claim, but it doesn't change the fact that the collateral was set off against the obligation.

And so particularly in the context of our discussion of the automatic stay, we've set forth the cases, and we've also set forth the contractual provisions showing that Intel had a right to do that. And just in terms of the case law with respect to set offs, the case law with respect to set offs is that if a prepetition obligation is set off against a prepetition debt, that terminates the debtor's property interest in the property. And that a subsequent

bankruptcy does not make that collateral which was set off the property of the estate, it was cited in the Quaid (ph) case, here in the Southern District of New York to that effect, and that reflects the general law with respect to set offs.

If there's been sort of an over set off, too much has been set off, all that does is gives rise to a breach of contract claim, and not otherwise. And the same law or the same principle, for example, applies in the cases of foreclosure.

So we cited the 2nd Circuit's opinion in Rogers versus County of Monroe, where there was real estate that was foreclosed upon in connection with a tax lien, and there was a contention that it was improper to foreclose upon the property, and that the property was worth more than the amount of the lien. And the Court there said that does not give rise -- does not mean that that property is the property of the debtor, no. Once there's been a foreclosure, that becomes the property or the foreclosing property, and the allegedly wronged party, if there was over foreclosure, if you will, or wrongful foreclosure, that gives rise to a breach of contract action.

So I think if you look at the law with respect to set off, the law is very clear, and the plaintiffs have not cited a single case to the contrary to question that.

Also there are provisions in the contract itself here that bear on this very question. There were restrictions initially on the types of investments to which Intel could put the collateral. But the contract says clearly, that upon -- in the (indiscernible) of the default remedies, those restrictions on the use of the collateral no longer apply.

Further, under paragraph H of the credit support agreement, it says, where a party has declared an early termination date and invoked its remedies, that's entitled -- now I'm reading from paragraph 8, from paragraph 8(a) subsection I, it's entitled to, "all rights and remedies available to a secured party under applicable law, with respect to the posted collateral held by the secured party."

So all rights and remedies under applicable law, and I've cited to you the law as set forth in the (indiscernible) Quaid decision, that if there's a prepetition obligation to the petitioning debtor, are set off when it gets the other, that extinguishes the ownership interest of the debtor in the property completely.

And there's simply no cases to the contrary. The law I think is crystal clear in that regard.

Let me go with respect to paragraph 8. So that's one remedy at law available to Intel under paragraph 8(a) of the credit support agreement.

Then there's Section triple I of paragraph 8(a) which says, that the right to set off amounts payable by the pledge or with respect to any obligation against the posted collateral. In other words, it expressly provides for the right to set up off the collateral.

And then lastly, and I think very significantly, there's section Romanet 4 of paragraph 8(a) of the credit support agreement with regard to the secured parties disposition of the collateral. It says as follows, it says, that the disposition of the collateral terminates "any claim or right of any nature whatsoever of the pledgor, including any equity or right of redemption by the pledgor."

So it just cuts off the right totally as a matter of contract. The only cases that plaintiffs could conjure up here were two cases involving the seizure of a vehicle. It was one case involving GMAC seizure, and another case also involved a seizure of a vehicle.

And both of the cases, there was a right of redemption on the vehicle owner. In other words, the car was seized for non-payment of a loan, but there was a redemption right in the contract or as a matter of state law, whereas the debtor could redeem the vehicle, and the debtor there was invoking those rights, redemption or had a -- still had an ownership interest.

So we have two car cases on the one hand, against

an unbroken line of authority, going back to In Re Quaid, going back to all the foreclosure cases of Rogers, both 2nd Circuit went back to the language I pointed to you that are essentially in the contract, in the credit support annex, giving Intel the right to do the set off.

But once -- but the law is, once a set off occurs, that transfers ownership to the party that's performing the set off and cuts off the ownership rights of the party that previously owned any of the property.

THE COURT: And is that true even if hypothetically Intel was not acting reasonably and not acting in good faith, and in fact, was acting with some kind of evil motive to seize property belonging to LOTC?

MR. BUCKLEY: It doesn't matter.

THE COURT: You're saying motive and bad intent and maybe even criminal conduct doesn't override this.

MR. BUCKLEY: Well, criminal conduct is not unalleged (ph), but --

THE COURT: I'm not suggesting for a minute that it could be alleged.

MR. BUCKLEY: Okay.

THE COURT: I'm just having a hypothetical conversation with you.

MR. BUCKLEY: What I'm saying is that the cases don't say, well, if it's done willfully there's a different

rule, or if it was done with bad faith there's a different rule. They're establishing clear lines here so that parties can act accordingly, not blurry lines.

And the clear lines are the rule of set off. And again --

THE COURT: And I'm raising the issue of wrongful set off.

MR. BUCKLEY: Well, wrongful in the sense it was reasonable, unreasonable, or in bad faith, those are the provisions of the contract. So you'd have a breach of contract claim, but there's no residual right in the property once it's been set off. It's posted as collateral, it's there to be set off against, it was set off against. If the (indiscernible) was misapplied, then it was breached, and you have a claim for money damages under the contract and whatever amount you're entitled to.

But what you don't have is a claim for turnover, and you don't have a claim for a violation of the automatic stay. And again, diligent counsel canvassing the entirety of the case law with freedom to point to any analogies that they wished could come up with nothing except the vehicle cases where there was a right of redemption, or by contractor statute, a residual ownership interest, which is not the case here because the contract rules out any right of redemption.

The contract says as well that Intel has all rights under applicable law. So I go back to the Quaid decision, which says again, that if it's a prepetition obligation, it gets a prepetition debt, but that affects the transfer of the ownership of the property, and that is a -- if there are Bright-Line rules, that is a Bright-Line rule. Otherwise, every time a creditor exercises a right of set off against posted collateral, it would be open to the argument that it was done in bad faith.

And so the right would be meaningless, because people would just file bad faith actions, and alleged criminal conduct, willfulness, and that would obviously have an effect upon the terms of credit that the parties are willing to extend, if they felt that they were not able to go against the collateral per the contract, it would be very unsettling I think to relationships between creditors and debtors, where there was collateral posted for a reason.

I mean, to undermine the rule in that way would make the posting of the collateral a meaningless event, and would put everyone at jeopardy, particularly in the context of a subsequent bankruptcy of the debtor, where people could bring turnover claims or claims for willful violation of the automatic stay provision, and expose the party to all kinds of remedies that one never expected, including statutory remedies of attorney's fees and so forth, which would be

really a parade of horribles.

And that's why the Courts have adopted these Bright-Line rules. Let me also add that there's no allegation in the complaint that post set off, post application of the funds to satisfy the obligation that LOTC owned Intel, that the cash collateral was kept in a segregable account, that it's identifiable, that it's traceable in any way. I mean, this is cash, we're talking about cash.

And even under the contract, even prior to the invocation of default remedies, per the contract, Intel had the right to commingle the cash with its own assets, so the thought that it was being kept separate and apart and not commingled is wrong. It had a right to commingle. Then it exercised its right of set off, and as I've indicated under the provisions of the contract, that's what entitled Intel to do.

And if misstepped in terms of, oh, your loss was less, and so forth, that isn't an answer, because the ownership right was extinguished at the time of the set off.

With respect to turnover, I'd also point out that turnover only applies where the debtors right to the property is undisputed. The overwhelming weight of authority is to that effect. There are very few cases that suggest to the contrary, and that's the rule that the courts

invariable file -- follow.

And here the complaint itself so there's a controversy with regard to this very question. In paragraph 73 the plaintiffs, in fact, allege that there is an actual controversy between the parties regarding whether the swap agreement requires Intel to return to LOTC the unlawfully withheld collateral.

So they admit it's disputed, and we've also pointed out in our papers cases to the effect that the burden is on the plaintiff to show that it has an undisputed claim or right to the property.

And in -- a well pled complaint must contain an allegation that the right of the property is undisputed, that's acknowledged. And here, rather than contending such a contention, the opposite is said, that there's a controversy with regard to the entitlement, the plaintiff's entitlement to the money.

I could add they're also internally having a debate over how much they're entitled to. One number they've thrown out is about $127 million, the other number is $300 million. So they're expressing uncertainty as to what the actual loss was, and how much they may or may not be able to recover in damages under their claims.

All that leads to the conclusion that this is a disputed claim where -- if there's still any question about

that, we could turn to the contract itself.

THE COURT: Not necessarily a disputed claim, maybe a disputed or uncertain way to calculate the claim.

MR. BUCKLEY: Well, if there's -- one thing one could not deny is that there's a good faith real and substantial debate here over whether this collateral, which has been set off and doesn't exist anymore is still somehow in some kind of hypothetical sense, theoretical sense, the property of the estate.

THE COURT: That indeed is out there. That's part of this argument.

MR. BUCKLEY: Right. No one could deny that this is a good faith dispute as to that.

And so we're saying in terms of turnover, there is a debate, there is a dispute and turnover is not available in the context where there's dispute over the claim. It has to be an acknowledged claim, because it's a summary proceeding, and if there's real doubt as to whether or not the plaintiffs are entitled to recover, the claim fails.

With regard to automatic stay, I think in my colloquy with you, I think I've covered the points there. The automatic stay, everything depends on the plaintiffs showing that post set off, post application of the collateral that that was still the property of the estate. But I've pointed to you the case law with regard to set off,

which is again clear case law. I've pointed you to the foreclosure cases. I've pointed out as well that there's no identifiable segregable cash separate and apart, it's not alleged to be here that exists. In any event, the contract provides that Intel had all the rights under applicable law, in the event of an early termination date to set off its losses against the collateral, and that's what it did.

So for those reasons, I would ask you to dismiss the turnover count, and to dismiss the automatic stay violation count, and to also determine that the breach of contract claim is a non-core claim, and it only relates to, or comes -- arises under these sort of relating to jurisdiction, not under the arising under or arising in. Thank you, Your Honor.

THE COURT: Okay. Thanks very much.

Mr. Gaffey, I want to welcome you back to our refurbished courtroom. I bet you don't recognize it.

MR. GAFFEY: I was quite surprised when I got here, Your Honor.

THE COURT: You barely recognized it.

MR. GAFFEY: It's quite an upgrade.

THE COURT: It is quite an upgrade, and I'm amazed myself.

Before we get into your argument, I was told at around 2 o'clock when I came out here, that our ECRO

operator has a 4:30 cut off, correct?

ECRO: Yes, sir.

THE COURT: So what I think makes sense is for us to take maybe a five minute break right now before you start, and my courtroom deputy is going to take over, and we'll be able to cover the recording of your argument, and additional proceedings through 5 o'clock.

MR. GAFFEY: Sure, Your Honor.

THE COURT: Okay. We'll take a five minute break.

(Recessed at 4:14 p.m.; reconvened at 4:24 p.m.)

THE COURT: I can tell you're -- oh, be seated, please. I can tell you're asking to be excused.

UNIDENTIFIED: Yes, Your Honor, Mr. Gaffey said it was okay if we just asked you if we could be excused. We are up next, but it looks like we'll not be able to finish today or start today, so we're available to come back at the next omnibus, if that's okay with Your Honor.

THE COURT: That's fine with me. And I'm sorry that you had to sit through the entire afternoon, but you have to admit it was pretty interesting.

UNIDENTIFIED: It was.

THE COURT: Okay. I'll see you next time.

MR. GAFFEY: May I proceed, Your Honor?

THE COURT: Please.

MR. GAFFEY: For the record, Robert Gaffey from

Jones Day for the debtor.

Your Honor, I'd like to start in addressing what I think is my sense of what Intel is trying to achieve here overall and the relationship between the three counts in the complaint.

I'll talk a little about a few things that Mr. Buckley had to say in his argument on the extinguishment of the property, the alleged distinguishment of the property and then moving to some details about core and non-core, which I think we ought to sort of cover the realm.

I think overall what the Court is -- what I'm seeing, and what I hope the Court sees in Intel's approach to this case is an attempt to by separating its component parts, dismantle it, and then call it a garden variety contract suit, and then seek to have it sent away.

By moving for the dismissal of the turnover claim, by moving for the dismissal of the automatic stay claim, based on the essential premise as I understand it, that the property rights of the debtor disappeared because of various reasons, the contract itself or the filing of LOTC, which that point alone, just by the way, disregards this Court's fairly repeated pronouncements that the Lehman bankruptcies are viewed as an integrated series of bankruptcies.

THE COURT: I believe I used the term a singular event.

MR. GAFFEY: A singular event, and that's given the complexity of the bankruptcies and complexity of the company, and Your Honor stressed that in Bank of New York, and in Ballyrock, which were mentioned in the argument earlier, and as recently as Ford Globawitz (ph), it's a pronouncement the Court has made very clear.

The attempt to make the property disappear is an attempt to turn this into a breach of contract action, and then walk into cases like Your Honor's decision in Extended Stay. The fact of the matter is, the Extended Stay decision while it does have the holding that Intel cites, that in that case, the fact that a bankruptcy filing was a trigger, what Your Honor called in that case a bad boy clause was essentially incidental to everything else about that case. That was a case by one non-debtor against another non-debtor concerning a guarantee of the debts of the distant not involved obligor, the debtor. Very different from this case.

Here the debtor is a party. Here the debtor's rights to its property under the Bankruptcy Code itself are at issue, that's why there's a turnover claim, that's why there's an automatic stay claim.

And a lot of what Intel does here revolves in one form or another around the notion that LOTC's property rights and collateral in a flat amount, it did not fluctuate

over the course of the transaction magically disappeared as soon as it was able to exercise its valuation of its loss under the agreement.

And Mr. Buckley offered a few of Intel's reasons for that, and I'd like to just go through a few of them.

One is the suggestion that the definition of exposure in the agreement somehow leads to the conclusion that the loss here was by coincidence exactly the same amount of the entire pot of collateral that was seized.

Well, to use that definition as a proxy for loss, is simply to write out of the agreement the fact that the parties made express agreements as to how loss would be measured, if and when shares were not delivered, and surprisingly, that's in the definition of the word loss, which is incorporated in the loss second method that the parties expressly agreed to, and both parties agree that that's the reason for calculating a loss.

It is not the measure of loss after a failure to deliver by LOTC, it is merely the measure of what the collateral was, and what the WVAP, what the weighted variable average price mechanism was to determine not how much Intel lost, but how many shares were to be delivered.

Once no shares are delivered, then the loss calculation comes into play, and Intel has an obligation under the agreement to calculate it in good faith. The

complaint alleges they did not do that, and that's what needs to be litigated, and that's why it's a viable claim, and that's why it can't be dismissed at this stage.

The open question is, is it -- did they operate in good faith when they calculated loss and it happened to come out to exactly the same amount as the collateral.

THE COURT: Were the 50.5 million shares ever delivered?

MR. GAFFEY: I beg your pardon, Your Honor?

THE COURT: Were the 50.5 million shares ever delivered?

MR. GAFFEY: No, they were not. And that's relevant.

THE COURT: Isn't that a problem?

MR. GAFFEY: It's a problem in the sense they didn't get the shares that they were supposed to get. It is not a problem in terms of the legal analysis here.

When the shares are not delivered, when the shares are not delivered, Intel is entitled to call an early termination, and it does. It -- but it bases the early termination, it bases its call of termination on the filing of LBHI. It doesn't declare an early termination date until the 29th of September.

The remedy that Intel is entitled to under the agreement, if there is a failure to deliver the shares, is

to be compensated for its loss. Its loss is calculated by loss second method, with reference to the definition of loss. Nothing in there, nothing in that contractual path transforms the collateral into a measurement of Intel's loss into a substitute for a good faith calculation of what its loss is in the manner that the contract requires.

Nobody disputes here that LOTC was required to deliver shares, and nobody disputes that they did not. But the issue here is, what's the appropriate measure of loss, and the issue here as Your Honor I think -- the term Your Honor used, I think is the right one is, was it a wrongful set off.

Intel will suggest that this is a dispute about LOTC's property rights in the collateral. It is not. We concede their right to set off in a correct amount. We concede that that right to set off arose on the failure to deliver the shares.

What we sue for, what we don't concede, is for the excess over an appropriate set off. This is a case about wrongful seizure of the rest of the collateral, and that's an amount of either 127 or $312 million depending on whether the Court would ultimately take into account the blackout period that prohibited Intel from purchasing.

THE COURT: Let me ask you a question, which is a derivative of the question I asked Intel's counsel right at

the beginning. And that is, a billion dollars moved from Intel to LOTC and a billion dollars moved from LOTC to Intel. Correct?

MR. GAFFEY: Yes.

THE COURT: At the moment that they terminated the agreement on September 29, and then proceeded to set off either justifiable or unjustifiably as the case may be, there were also out of pocket a billion dollars.

So one way to look at this is that they took their billion dollars back.

MR. GAFFEY: That's exactly what Mr. Buckley said they did, and it is a way to look at it, but it's not the way loss is measured under the contract.

The contract provides how their loss is to be measured. They get to put forth a reasonable calculation under the loss second method -- mechanism of calculating damages. That's by reference to market prices. There's no provision in the contract that says, we get our original price back. There's no provision -- because, among other things, it makes sense, they could mitigate. They have an opportunity to go out and buy with the money that they set off, and they get the difference.

So it's not as if they're completely out of pocket. They have their set off rights, and it's not as if the contract did not provide for how their loss would be

measured. It provides expressly for how their loss should be measured.

So they don't need to resort to self-help, and to say, well, we're just going to keep our purchase price, and that's not the reason for the exchange. As Your Honor noted, there was an actual or asked and learned, there was an actual exchange here, and that goes to Intel's suggestion that because cash is fungible, what was collateral turned out not to be collateral, and LOTC has no right to get it back.

Well, again, the contract has provisions that cut directly against that contention. The contract provided, just as you would expect with collateral, that LOTC is the sole owner of the collateral. It says that in paragraph 9 of the credit support annex.

Intel has the duty of reasonable care with regard to the property while it is being held as collateral. That's the credit support annex paragraph 6. Permitted investments or something you do with someone else's property, they were limited, the investments they could make with the collateral. They were required by the contract to report to LOTC on income earned on the collateral because LOTC would have tax issues.

And Mr. Buckley made a point of saying that the contract did not require Intel to segregate the cash. But

what the contract actually says if Intel did not segregate the property, it's required to maintain what the contract calls separate notional accounts if it commingles the funds on its own treasury records. So it has to annotate it to us.

Now, with regard to their argument that this property is gone, it's cash, it's fungible, they rely on their papers on Schrempf (ph) the Supreme Court decision which involves a banking deposit. Well, as we know, and as the Court explained in Schrempf, this is -- the reason that the result in Schrempf was what it was, because the depositor in a bank does not have a property interest in specific property or property interest at all, it has a contractual right to get money on demand of the bank, that's the difference between banking and depositing collateral.

Had that money been put in a safe deposit box, had that cash been put in a safe deposit box to be held by the bank pending next event, the demand of its return, wouldn't have that issue. So Schrempf just simply doesn't apply here, and I think the fact that Intel has gone so far as to rely on it demonstrates why they too understand this argument is very weak. They're trying to make what LOTC is LOTC's property disappear.

And the reason they want to do that is they want to translate this into where I think Your Honor's question

was going, into a measurement of damages in a contract case.

The turnover provision is because we -- the estate wants its money back. The automatic stay claim is because to the extent the collateral exceeds their loss properly calculated, they are holding onto estate property in violation of the automatic stay.

We don't, we agree, the parties agree, we don't contend the automatic stay applies to that rightfully withheld, but it does continue to apply to that wrongfully withheld.

I'm not sure that addresses Your Honor's question, but I think it does. I think it goes to this point of why aren't they just getting their money back, and the short answer is because that's not what the contract gives them, the contract gives them express remedies.

THE COURT: Understood that that's your position, but I was -- what I was getting at and it's beyond the procedural scope of the motion to dismiss is some attempt to understand the fairness of LOTC having a billion dollars, having went into the -- I guess they went into the market, and they acquired shares consistent with the agreement under this highly structured strategy to accommodate Intel's desire to purchase its own shares even though it couldn’t do so directly. The shares were acquired, they were not delivered. That means that the billion dollars posted by

Intel with LOTC was used to acquire shares presumably they were with a billion or they were less than a billion at the time that they were purchased for Intel's account.

So that from the perspective of LOTC's side of the ledger, they have undelivered shares and to the extent there's excess cash, cash. Intel has nothing. Except the right to exercise remedies with respect to the billion dollars.

MR. GAFFEY: But look at what the remedy is, and I think that remedy is the concern.

THE COURT: My concern is that I'm going beyond the scope of the motion practice here into the -- I hate to even use the term equities of the case, I'm trying to understand the nature of the claim that you're making, because it seems as if Intel did what any ordinary course party in the same circumstance would do, they took their billion dollars back.

MR. GAFFEY: Let's look at what Intel purchased, what it bought, what it wanted, what it was entitled to get out of the contract. Intel agreed, Your Honor, that what it wanted delivered to it was a certain amount of shares.

THE COURT: 50 --

MR. GAFFEY: Not a certain value.

THE COURT: 50.552 million I think.

MR. GAFFEY: As it turned out, it was 50.552

million. The reason it turned out it was 50.552 million is the contract had a formula that said, on the termination day, which here is September 26th, which is the day it was to be determined how many shares it would get, you would take the weighted variable average price, you would apply the formula that was in the contract, it was $19 or such a share on that Friday, it would tell you how many shares they were entitled to get.

The shares were to be delivered the next business day. The next business day is Monday, the 29th. They are not delivered, no dispute about that. What is Intel entitled to under the contract, 50.552 million shares, not the amount it was used to value, not the amount that it paid at the beginning, but what it bargained for, 50.552 billion (sic) shares.

By Monday, the 29th of September, the price of the shares, in reference to Bloomberg, had dropped from about 19 bucks a share to about 17 bucks a share. I forget what the prices were.

What that means is, if on Monday the 29th, when it did not get the 50.552 million shares it was entitled to receive, on the market those 50.552 million could have been bought for less than the Friday amount, and less than the billion that Intel paid.

But what Intel paid a billion dollars for back on

August 29th was the right to have an amount of shares delivered to it. It wasn't with regard to their market value, it was with regard to the amount of shares.

If you look at the first letter that Intel sent in that sequence that Mr. Buckley describes, that's what they say, we're entitled to 50.552 million shares. When they write their second letter on the 29th, this is when what we believe is the incorrect nature of their petition begins to emerge, now they say a billion U.S. in Intel shares. That is not what they bargained for.

They agreed to pay a price of a billion, they agreed to get an amount measured by a formula, that amount wasn't delivered, their loss -- the loss mechanisms of the contract will compensate them for what that specific amount of shares would have cost on the 29th.

If you take the black-out period into account, and this is again probably something that will be I hope resolved here down the road, if you take out the black-out period into account, what happens in between September 29th and November 4th when the black-out period is lifted, is the price of the shares drops even further, hence the bigger difference between what it would cost to replace them and the billion dollar in collateral that was deposited.

Now, that's a risk that Intel took. I don't have a specific answer for Your Honor as to which one to take,

the 127 or the 312, but I do have a specific answer I think to the question about the equities of the contract.

The contract provided for delivery of a specific number of shares, the loss mechanism gave them the money they would've needed to replace what was not delivered. Those things match up equally, there's no inequity in that.

What Intel is attempting to do here is to be opportunistic and walk past the loss measurement provisions in the master agreement in paragraph 6, and instead choose provisions of the agreement that are not about measuring its loss, that are about measuring other things.

Another provision that Mr. Buckley mentioned, and it has a tantalizing name, agreed value. So that sort of sounds like it ought to be a damage provision, that's not what this was for. The agreed value provision relates to what value the parties would have put on hedging positions had they been delivered, in terms of doing the overall math it did, Intel got what it bargained for.

No hedging positions were delivered, that provision of the contract is irrelevant. Mr. Buckley also said at one point I think that Intel was entitled to hang on to the billion dollars because at paragraph H(c) of the agreement. Well, H(c) of the agreement -- and that again, goes to Your Honor's equities' questions, why can't they just keep the billion.

Well, H(c) says that after set off, after set off, any proceeds, and I'm leaving out some phrases here, any proceeds remaining after satisfaction in full of the amounts payable by the pledger have to be returned to the pledgor, LOTC.

Translation, you get to keep out of the billion what you're entitled to in set off, but you must return the rest, you must return the rest. There's nothing in this contract that says, Intel gets to keep a billion dollars. It's not a liquidated damages clause, it's not a penalty provision. It's not a setting of what their loss will be, it goes to Your Honor's question, they don't just get their original money back. The contract provided exactly how they were to be compensated.

Now, one other point that I want to raise with regard to the cash is fungible point, or actually to the Schrempf case to Mr. Buckley's argument that the automatic stay, on the turnover claims can't apply to cash. I think the Court's decision in MedAvante undercuts that. Cash is property of the debtor. It doesn't cease to be property of the debtor because it's cash or it's turned into cash or it's a right to cash. There's no magical difference.

So the lynch pin of their case being to try to make the property disappear doesn't work. It remains LOT's property to the extent that it was withheld over and above

rightful set off and it is a wrongful seizure.

THE COURT: Okay. But Mr. Buckley made an argument based on a line of cases, and he said that your case is only related to a couple of automobiles that when you set off, as a secured party setting off, you effectively obliterate the property interest of the party that had pledged the collateral.

And he cited real estate foreclosure as an example, and this is another example. How do you overcome that argument?

MR. GAFFEY: I think the Court needs to look at a fact that both parties agree it's so and each argue differently from it, and that is the fact that the billion dollar collateral pot never fluctuated over the course of the transaction.

There are swaps similar to this where the collateral is valued daily to try and make an approximate what the value of the shares to be delivered would be. But here, the parties agreed it stayed at a billion dollars.

So in those cases where there's a right of redemption, in those cases where the property is deemed to be subsumed by the set off and in full, there are cases where the value of the property is related to the value of the loan in a mortgage case, or the loan in a car case. The value of the performance to be delivered.

There's nothing in this contract, and in fact, it is to the contrary, because the billion stays flat no matter what happens to the value of the shares over the course of the transaction, that equates the value of the collateral with the value of the shares.

Now, that's a subpart of the bigger theme that I'm pursuing here, which is that there's no -- that the billion dollars is not a proxy for loss, not a proxy for damages, it's not even a proxy for value of the undelivered shares.

It's a way to help protect Intel in the event of a breach of a default of a failure to deliver, but what would Intel say to Your Honor if the fact of the matter was, their loss, as properly measured under paragraph 6 of the master agreement exceeded a billion dollars, if share prices had moved differently, and even -- a billion dollars wasn't enough to cover it?

I find it hard to imagine Intel would be at this podium saying, well, you know what, the collateral is a replacement for that, and it would've been subsumed, that's what we get, we don't get anymore, we don't have a claim to bring. That wouldn't be so.

So the fact that the collateral stays at that flat level without daily marking or daily valuation to make it equate the value of the collateral, I think is what that makes that fair, it's the risk that everybody took. Intel

said a billion ought to do it, they knew they could set off against it, if it was more, they have a right to go against LOTC, but if it's less, LOTC has a right to go get back the difference. That's an equitable deal.

And it cuts against the cases that Mr. Buckley relies on where the collateral for a loan is subsumed by the failure to pay the debt in full and in total.

THE COURT: Okay. Let me ask you a slightly different question. Assume for the sake of this argument that not only were the 50.522 million shares purchased, but they were delivered, and that the 50.552 million shares proved to have a value for the sake of argument of $900 million instead of a billion dollars. Who gets to keep the extra $100 million under my hypothetical that was pledged -- that was delivered by Intel to LOTC?

MR. GAFFEY: In effect, and at the end, LOTC, but because of the way -- I'm going to answer this question, the whole billion goes back to the debtor, the whole billion goes back. There's no accounting done against the collateral.

On delivery of 50.552 million shares, which is what Intel was entitled to, that amount of shares, the entire collateral pot is delivered back to the estate.

THE COURT: I understand, but I'm actually asking a different question.

I'm asking what happens to any excess of the billion dollars that was delivered by Intel to LOTC.

MR. GAFFEY: Intel doesn't get any of that back, because what Intel paid for, Intel paid a billion dollars for a specific number of shares. There won't be a true-up at the end where you say, all right, what were the -- what did they actually cost as against the billion I advanced, that's the price.

THE COURT: Okay. So the profit in the transaction from the perspective of Lehman's side is they get a billion dollars, they get to use a billion dollars to buy shares in the market over a period of time, and deliver those shares, and then they get their billion dollars in collateral back after they have performed, but they get to keep -- if the market was favorable during that period of time, they get to keep the excess over the actual cost of buying the shares and the billion dollars that was delivered by Intel, is that how this works?

MR. GAFFEY: Yeah, if the market is favorable to Lehman during the course of the transaction from the 29th to -- of August through this 26t of September, and such that Lehman is able to accumulate shares at prices so favorable that it cost them less total than a billion dollars to get the amount of shares that are to be delivered, it -- that's the benefit of the bargain, that's what it gets to keep.

THE COURT: And what happens if it costs an extra hundred million dollars to execute these trades, and it's a billion one?

MR. GAFFEY: Then Lehman's lost out on the trade because Lehman's obligation is to deliver a shares in an amount, sir. Over the course of the transaction, it costs Lehman more than the billion to accumulate the shares it was required to deliver, and therefore, it doesn't do well, it loses on the transaction. That's where the risk is here.

THE COURT: Okay.

MR. GAFFEY: And that's why a billion flat, as collateral, is not in any sense a proxy for any of these things, it's just what it says, it's collateral. The billion dollars is -- that Intel pays to Lehman is the price paid, the billion in collateral is to protect Intel against an unrecoverable loss because it will set off rights.

THE COURT: It's a nice round number.

MR. GAFFEY: On core/non-core -- well, it's -- yes, it is a nice round number, Your Honor.

On core/non-core, let me just, if I may spend a little bit of time on that. As I said, I think that Intel's reliance on Your Honor's decision in Bank of America against Lifestone, the extended stay decision is inapt because the cases are distinguishable. And I think the fact that they put so much weight on that case, demonstrates that what they

really are trying to do is reconfigure this case so they can call it non-core.

There's really no way to litigate this action without dealing with the turnover provisions in 542, the automatic stay provisions in 362, there -- it's a good bet there will be reference to at least in factual development to safe harbor provisions, because obviously there are strategies related to safe harbors that would be taken into account.

The debtor is the party here. This is different from Lighthouse where it's two non-debtors. That case lined up as non-core, there is no debtor involvement there. There's just no way to litigate this case without those pervasively involved Bankruptcy Code provisions.

They are inextricably entwined with the breach of contract claim, so it's not a garden variety contract claim as Intel would have it. It's a contract claim that's inextricably related to bankruptcy issues. It is core for that reason.

Intel says in their papers that it did not arise in the bankruptcy, and to do that, it separates out the filing date on September 15th, 2008 of LBHI and the October 3rd filing date of LOTC, but as I've said, I think that that's dealt with by Your Honor's -- the position Your Honor has espoused and the decisions you've made in Bank of New

York and in Ballyrock and the other cases, where you've addressed the singular nature of the Lehman bankruptcy.

THE COURT: Well, let's deal with that, because I think it's an important issue, and we didn't discuss it during Mr. Buckley's argument, and I'm certainly going to give him an opportunity to respond to this before the day is over, although we're getting close to the end of the day.

I think we're talking about something different. And I want to give it some more thought, but when I said, and I don't remember the precise words, that the Lehman filing was, in effect, a singular event, and I believe I reference this in a footnote in the BNY corporate trustee decision which I call perpetual, I was referencing the fact that this is really one of the most unusual bankruptcy cases that has ever been in part because on September 15 when LBHI filed for Chapter 11 relief here, it was a completely unplanned event, and the only entity that could file was LBHI, and even then, it filed with incomplete papers.

I don't believe that Weil Gotshal at any time in its history, even when it was a much smaller firm, and practically a bankruptcy boutique, filed any bankruptcy cases with so spare a set of first day papers. And that was a sign that we were dealing with the kind of emergency that we all confronted in the weeks and months thereafter.

In part for that reason, I was able to articulate

what I believed to be true in this instance, the filing of LBHI ordained the filing of a whole bunch of other affiliates that would have been filed at the very same time had there been adequate opportunity to plan.

And that was the notion underlying what I think was a footnote. And I'm not by any means by saying these things, seeking to influence any of the issues that are currently being litigated in the Ballyrock case.

But I think it becomes very difficult for us today to be talking about well, what about that gap period between September 15 and October 3 as it relates to now, another material date, September 29, 2008. And contractual rights that were perfected as of that moment in time, which as to the counterparty were non-bankruptcy contractual rights.

And the essence of the Intel argument with respect to non-core, as I understand it, is that if you look at the calendar for 2008, you'll find that September 29 was a date when LOTC was not in a Chapter 11 case. It preceded the filing by four days.

And so for that reason, to the extent that there are contractual claims back and forth in reference to that moment in time, those claims do not arise within the LOTC bankruptcy case. They arose before it.

And so what we're confronting here I think is the question of whether or not those claims are non-core, which

is what they want me to tell you.

MR. GAFFEY: I absolutely agree that's what we're confronting, Your Honor. Let me just add in a few considerations that I think go to the sequence. As Your Honor noted in the Bank of New York decision, and I was looking to see if I had the exact language, I don't, but the Court said there, and have said in Ballyrock, they should be viewed as an integrated set, or a uniformed set, and it described that history, what you just said, it was preordained that the affiliates were so closely linked with Lehman would themselves file, and not long after.

Well, let's look at what's alleged in the complaint here and what will be the facts of the case. It's not as if these two bankruptcies in reality in this deal are completely separate. The event of default is the filing of LBHI, the credit support provider of the collateral is LBHI.

When Intel wrote to Lehman Brothers OTC derivatives, and this is Exhibit 5 of the complaint, and said, pursuant to the terms of the confirmation, the number of shares to be delivered is 50.552943 shares and cash delivery amount is zero, in other words, it came to the 50.552.

They go on to say, we note that Lehman is required to deliver the number of shares at 4:30 on the 29th, and then they go on to say, in light of recent events with

respect to Lehman Brothers Holdings, Inc., and its subsidiaries, and given the absence of communications from our contacts at Lehman, please let us know as soon as possible if Lehman will be performing under the terms of the confirmation.

Now, that last piece is not dispositive of the concern that Your Honor has raised, I wouldn't suggest that. But I would say it's relevant to it.

It's an artificial construct to look back and say, because a certain of number of days exists between the 15th of September when LBHI filed, and the 3rd of October, when LOTC filed, they must be analyzed entirely separately for the purposes of core/non-core. Does it arise in the bankruptcy?

With documents like this, with facts like that, and with the shortness of time, and with the sentiments that Your Honor has expressed in perpetual, it's arising in the Lehman bankruptcies, it's arising in the set of bankruptcies, albeit by some separate, although close in time filings, beginning with Holdings and working through the affiliates, and what the Courts say about what is core and non-core those concerns are addressed. It doesn't rise or fall on some nicety of this day or that day.

And I think the benefit of the perpetual decision is it looks in realistic terms of what realistically

happened at what this bankruptcy and set of bankruptcies realistically is. And I would suggest that that moves the argument to the side of finding this to be a core proceeding.

And again, I don't think that's a lynch pin argument, I don't think it disposes of it, but I think it is compelling toward that conclusion.

I don't think core can be at core, non-core could be analyzed here without taking into account the view that this is a single integrated bankruptcy. And I know that issue is being litigated, Ballyrock will go where it goes. And one thing Your Honor noted in another proceeding, which I remember as Ford Global, and I'm afraid I don't have the quote there either, he said, apart from anything else, it might not be appropriate to cite it at this stage of the proceedings, there will be factual development. We'll see through discovery, we'll see through depositions how involved the -- how this arose out of the bankruptcy, how the real dispute here, or the defense of it arose out of the bankruptcy. It may not be a decision that needs to be made now.

Unless the Court has other questions for me, I'm prepared to sit and thank the Court for its time.

THE COURT: What do you say to the argument, which actually nobody has made orally today, that the bankruptcy

claims relating to turnover of property and automatic stay are, in fact, redundant of the first count for breach of contract?

MR. GAFFEY: They're not redundant, Your Honor, and we addressed this in our opposition pages in a separate paragraph or two. They're not redundant if for any other reason than there's very different remedies that flow from it. Breach of contract would entitle the estate to a damages remedy, a finding that there's a violation of the automatic stay would result in explicit orders that property be turned over, two different remedies.

There are provisions, and I have to admit, Your Honor, I forget whether it's in the automatic stay provision or the turnover provision for recovery of attorney's fees. So they're not redundant one or the other, they are about the same thing obviously, all claims certainly in the alternative are about the same set of facts, but they lead to different conclusions with different enforcement mechanisms, so they're not redundant in that sense.

THE COURT: Okay. All right. Mr. Gaffey, thank you.

MR. GAFFEY: Thank you, Your Honor.

MR. BUCKLEY: With regard to whether all of the bankruptcy should be regarded as a singular event, on the relevant date, as Your Honor has pointed out, LOTC was not

in bankruptcy, moreover, the allegation in the complaint is, that following the bankruptcy filing of LBHI, LOTC continued to perform under the contract, and continued to acquire shares. So the allegation here is that notwithstanding the bankruptcy filing of the ultimate parent company, LOTC continued to perform, and continued to acquire shares under the contract.

So it should be treated as a separate entity, and all other relevant events with regard to the breach of contract claim matured, occurred, transpired prior to the bankruptcy of LOTC. There's nothing in the breach of contract claim that relates to events subsequent to that filing.

With regard to the $1 billion collateral, is that an arbitrary amount, it's not an arbitrary amount. I mean, the basic fact is that Intel transferred a billion dollars to LOTC and got back collateral in the same amount, a billion dollars to secure LOTC's performance.

Mr. Gaffey is incorrect in describing the deal the contract is one where Intel at the outset decided upon its specific number of shares. It did not. What it decided to do is it wanted the billion dollars to be spent acquiring Intel shares, it wanted a billion dollars' worth of Intel shares. The question was, how do you price the shares, how do you determine how many shares, and the formula said,

we'll value them at VWAP. So what the number of shares determined by a billion dollars divided by the VWAP price.

So when, under the contract, Intel would have received whatever number of shares it would have been, it would have been a billion dollars' worth of shares, because it would have been essentially, the number of shares times the VWAP price.

THE COURT: So it would always be a billion --

MR. BUCKLEY: It would always --

THE COURT: -- it would just be -- but the number of --

MR. BUCKLEY: It would always --

THE COURT: -- shares would vary depending --

MR. BUCKLEY: Yes.

THE COURT: -- on a pricing formula --

MR. BUCKLEY: Right.

THE COURT: -- that's prospective, and so it couldn’t be determined --

MR. BUCKLEY: Yeah.

THE COURT: -- at the onset of the agreement.

MR. BUCKLEY: Right. And the contract also addressed the situation where there was we'll say partial performance.

Let's say here on the delivery date, Lehman had delivered 50 million shares, but was short a half million

shares. There will be a question of how you evaluate its performance, that's where we get into the use of the term agreed price. The deliverables, that is the shares actually delivered to Intel on the due date September 29th were per the contract, valued at the agreed, that is the VWAP price.

Then there was a cash component that was also due, because that was not a billion dollars' worth. How was it determined? It was determined very simply. You take the number of shares, say 50 million at the VWAP price, you come up with a value, and then you subtract that value from the billion dollars. And the shortfall would be in the form of an additional payment from LOTC to Intel, to equate to a billion dollars.

The exposure amount, which again we've cited the ISDA user's guide as to what an exposure amount means under an ISDA agreement, that's the amount that will be payable to Intel in the event of a no fault termination of the contract. That's what it says, and we've cited it in our papers.

One other provision I didn't have time to mention before was Section 6(d)(C) of the confirmation which says that under the contract Intel "shall have no obligation to return any of the posted credit support until such time as the early delivery amount or final delivery amount, or a portion thereof, consisting of the number of shares to be

delivered shall have been delivered."

In other words, the billion dollars was being held as against the delivery of shares at the VWAP price that equated with a billion dollars. So there was a perfect coherence, it was not an arbitrary amount. It was the amount that for a billion dollars, we're paying you, we're getting a billion dollars' worth of shares back at the VWAP price, it was perfect harmony in the use of a billion dollars. It was not some number just made up as a comfort number, it was the value of the deliverable that it should have been. And that's we say a billion dollars was a reasonable amount.

I would note Mr. Gaffey did not really address the law of set off. I cited a couple of cases. I had mentioned the Quaid case (indiscernible) we also cite, these -- the Quaid case involved funds, so it was not a property foreclosure, it was actual funds in the possession of the creditor, applied to set off a prepetition debt, and that's where the Court in that case said, it's a Southern District of New York decision, to the extent a creditor sets off for prepetition debt against prepetition obligation, prior to the bankruptcy case having been commenced, such set off does, in fact, effectuate a transfer that prevents the specific property from becoming property of the estate, and qed, that's the result here.

And we've cited foreclosure cases by analogy, we've cited other cases -- we've cited provisions of the contract that lead to the same result, and I would point out that one of those provisions I cited was paragraph 8(a)(IV) of the credit support annex which says that in the event that Intel exercises default remedies and declares an early termination date, that Intel's disposition of the collateral, it says, terminates the property rights of Lehman, in effect, to the collateral to LOTC, and it shall have no right in equity or at law of redemption.

So I think the wording of the contract is quite clear, that's a cut off. But it's in harmony in what the common law would have provided even absent the specific contractual provision in the (indiscernible) contract.

I know the hour is late and Your Honor is very gracious in extending beyond 5 o'clock, so I just would think just to wrap up with one comment about whether this is core or non-core.

The test is the same one that you stated in Extended Stay for arising under. Could this claim exist outside of the bankruptcy world, clearly it could, and there's nothing about this claim, if the set off was excessive, you miscalculated the loss, and so forth, you took too much collateral, there's nothing in bankruptcy specific or unique about that. And therefore, it fails the

test under the statute.

But even beyond that, if you look at Stern -- the Stern decision. There, the Supreme Court laid down a very clear rule about the nature of the claim being the determinant. That is, the nature of the claim is what matters. And where it's a matter of private right then, it's not a matter for a non-Article 3 court to render a final judgment on. So in other words, it's a non-core case.

And in the monograph put out by the American Bankruptcy Institute, views from the bench, Your Honor was I noticed one of the participants, we've cited it in our papers and attached it as an exhibit --

THE COURT: It's shocking to see stuff that I've done cited back to me. I guess I was --

MR. BUCKLEY: Well --

THE COURT: -- doing views from the bench that year, and I'm doing them again this year.

MR. BUCKLEY: I think you'll find some comfort in what was said in the monograph is consistent with what all the courts have said with regard to what the impact of the Stern case was.

And that is, cases before it, for example, like United States Lines has been turned on its head by Stern, and it doesn't matter how important the claim might be to the administration of the bankruptcy estate, it's the nature

of the claim that controls or is it a matter of private right, then that's a non-core claim, as a matter of constitutional law. That's what we argued here.

With regard to loss, I'll just add one clarification. Loss is different from market quotations, so you can have two different systems. Market quotation, you go out and you try to get bids from the market. Loss doesn't look to market quotation. Loss allows here, the creditor, the secured party to determine its loss, as long as it does so reasonably in good faith, it can apply any system or any approach that it wants.

Aside from all the technical aspects of the contract I've given you, this boils down to a very simple matter, and Your Honor I think began his inquiry with Mr. Gaffey with making the same point.

You know, Intel did not give something in exchange for nothing. Intel gave a billion dollars for a billion dollars' worth of performance, and that VWAP times number of shares equals a billion dollars. It got nothing back.

So this is a case where you would say it was a fundamental breach of the agreement, and even under principles of restitution, which could apply under a loss analysis because it would be reasonable to apply restitution principles, when there's been a complete failure of performance. I gave a billion dollars, it went into a black

box, I don't know what happened, I got nothing out of it. One it's entitled to restart and get the billion dollars back, the billion dollars that you gave and you got nothing in exchange, and you can look to the collateral. That's why it's there, to secure that performance. Thank you, Your Honor.

THE COURT: Thank you very much. Mr. Gaffey, do you have anything more?

MR. GAFFEY: Just one thing, Your Honor. I just got nothing back, it has a billion dollars, 800 -- we agree they have a right of set off, they got plenty of that, I just don’t want to end the argument with the notion that we have both billions. They are -- they set off their loss, so I --

THE COURT: I know you don't have both billions.

MR. GAFFEY: Okay. Thank you, Your Honor.

THE COURT: But you do have the first billion plus to the extent that you performed by going into the market and acquiring shares that were worth something at the time, and are probably worth more today, sounds like it balances out to me.

MR. GAFFEY: But part of the balance is, they have the collateral, and they have a right to set off. It's not something for nothing. The question is how much their loss is and you measure that by loss under paragraph 6.

THE COURT: I understand. What we have before the Court today is a purely procedural question that doesn't go to the merits, and we've been addressing the merits in ways that have been informative to me, but in no way will influence the decision on the procedural questions presented. I think there's sufficiently complicated, that while I could take a stab at a bench ruling right now, I think it makes better sense for me to take this under advisement.

Meanwhile the parties recognize that this is not a dispositive motion to dismiss in any event, but merely a motion designed to trim two counts, and to declare that the first count is non-core, that means the parties will be dealing in this forum or some other forum in any event with the fundamental issues that are presented by the complaint, and I presume as a result that while awaiting this decision, you'll proceed to handle the case in a responsible manner, and deal with discovery and such issues.

And I believe that -- is there a discovery stipulation?

MR. BUCKLEY: Discovery is moving ahead.

MR. GAFFEY: It's afoot.

THE COURT: It's afoot. That's fine.

MR. GAFFEY: It's afoot or ahead one or the other.

THE COURT: Well, it's -- that's fine.

So I appreciate the argument and the time that everybody's been here today. It's been a long day for all of us, especially for me, having been here from 10 o'clock on Lehman matters. And I think it's a suitable way to recognize the fifth anniversary of the filing. The case has not gone away.

And with that, we're adjourned and I'll provide a ruling in due course.

(Proceedings concluded at 5:16 PM)

I N D E X

RULINGS

C E R T I F I C A T I O N S

I, Dawn South and Sheila Orms, certify that the foregoing transcript is a true and accurate record of the proceedings.

Dawn South

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Dated: September 20, 2013

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